

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 28 P 3:36  
BY: [Signature]  
DEPUTY CLERK

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

TROY ANTHONY YOUNG,  
Defendant.

ORDER

Case No. 2:04CR709 TC

This matter is before the court on Defendant Troy Anthony Young's request for a hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Mr. Young seeks the hearing in an effort to demonstrate the inadequacy of a warrant affidavit in support of his motion to suppress the evidence.

But Mr. Young is not automatically entitled to the hearing he seeks. In Mr. Young's request for a hearing:

[t]here must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. [The allegations] should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks, 438 U.S. at 171; see also U.S. v. Artez, 389 F.3d 1106, 1116 (10<sup>th</sup> Cir. 2004); U.S. v.

Corral-Corral, 899 F.2d 927, 933 (10<sup>th</sup> Cir. 1990); U.S. v. Owens, 882 F.2d 1493, 1498 (10<sup>th</sup> Cir.

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1989). Mr. Young alleges material omissions in the warrant affidavit, which requires that he meet the same standard as if he had alleged deliberate falsehood. See Stewart v. Donges, 915 F.2d 572, 582-83 (10<sup>th</sup> Cir. 1990).

Mr. Young has requested a Franks hearing solely on the allegation that the affiant omitted details regarding the reliability of informants. Mr. Young has not pointed to the specific portion of the warrant affidavit where the omitted evidence was necessary. He has not provided any affidavits or otherwise reliable statements indicating that such a hearing is warranted. As noted in Franks, "allegations must be accompanied by an offer of proof" which has not been provided in this case. Franks, 438 U.S. at 171,

Accordingly, Mr. Young's motion for a Franks hearing (Dkt.# 17-2) is DENIED. Mr. Young has fifteen days from the issuance of this order to submit a supplemental memorandum in support of his motion to suppress. Upon receipt of the supplemental memorandum, the United States will then have an additional fifteen days to respond. Final oral arguments are scheduled for Monday, March 14, 2005, at 3:30 p.m.

SO ORDERED this 28 day of January, 2005.

BY THE COURT:

A handwritten signature in cursive script that reads "Tena Campbell".

TENA CAMPBELL  
United States District Judge

alt

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00709

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Vernon G. Stejskal, Esq.  
DRUG ENFORCEMENT ADMINISTRATION  
METROPOLITAN NARCOTICS TASK FORCE  
348 E SOUTH TEMPLE  
SALT LAKE CITY, UT 84111  
EMAIL

Mr. Edwin S. Wall, Esq.  
WALL LAW OFFICES  
8 E BROADWAY STE 500  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
/  
EMAIL

US Probation  
DISTRICT OF UTAH  
/  
EMAIL

FILED

CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, NORTHERN DIVISION

BY:

DEPUTY CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

BIRIDIANA BECERRA and JUAN  
MANUEL MILLAN ROCHA,

Defendant.

**ORDER**

[DENYING DEFENDANTS' MOTION TO  
REVEAL THE IDENTITY AND  
LOCATION OF CONFIDENTIAL  
INFORMANTS]

Case. No. 2:04-CR-60 TC

On December 21, 2004, an evidentiary hearing was held by the Court to consider the Defendants' motion to reveal the identity and location of confidential informants. The defendants, Bridiana Becerra and Juan Manuel Millan Rocha, were not present at the hearing however their presence was waived and they were represented by their respective counsel, Robert K. Hunt and James A. Valdez. The United States was represented by its counsel, Lana Taylor. During the hearing arguments were made by both parties regarding the defendants' motion. Based upon all of the information received from and arguments made by the parties, the Court makes the following findings:

The Court FINDS, the C.S. and the C.C. gave information to law enforcement that was used in the preparation of a search warrant but were not present at the time the warrant was executed.

The Court FINDS, that the involvement of the C.S. and the C.C. in this case is similar to that of a mere "tipster" as in *U.S. v. Zamora*, 784 F.2d 1025 (10th Cir. 1986).

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The Court FINDS, that the disclosure of the identity of the C.S. and the C.C. is not required because they neither observed nor participated in the charged offense and there is nothing to indicate that they possess information material to the defendant's defense.

Based upon the Court's pronounced finding in open court and in conjunction with these written findings, the Court ORDERS that the government is not required to reveal the identity of either the Confidential Source or the Concerned Citizen listed in the Affidavit in Support of Search Warrant.

DATED this 27 day of January, 2005.

BY ORDER OF THE COURT:

A handwritten signature in black ink, appearing to read 'DN', is written over a horizontal line.

DAVID NUFFER, Magistrate Judge  
United States District Court

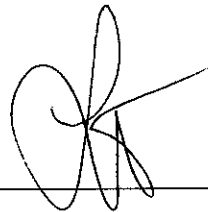
CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing ORDER [DENYING  
DEFENDANTS' MOTION TO REVEAL THE IDENTITY AND LOCATION OF  
CONFIDENTIAL INFORMANTS] was mailed, postage prepaid, to all parties named below this  
26<sup>th</sup> day of January, 2005:

JAMES A. VALDEZ  
466 South 400 East Suite 102  
Salt Lake City, UT 84111  
Attorney for Juan Manuel Millan Rocha

A. JASON VELEZ  
311 South State Street  
Salt Lake City, UT 84111  
Attorney for Jesus Garcia Rocha

ROBERT K. HUNT  
Utah Federal Defender's Office  
46 West 300 South Suite 110  
Salt Lake City, UT 84101  
Attorney for Biridiana R. Becerra

A handwritten signature, likely of Robert K. Hunt, is written over a horizontal line. The signature is stylized, with a large 'R' and 'H' visible.

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00060

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Lana Taylor, Esq.  
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE  
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SALT LAKE CITY, UT 84190-1200  
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David O. Leavitt, Esq.  
470 E 3900 S STE 200  
SALT LAKE CITY, UT 84107  
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Mr. James A Valdez, Esq.  
466 S 400 E #102  
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Sharon L. Preston, Esq.  
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Robert K. Hunt, Esq.  
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SALT LAKE CITY, UT 84101  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
,  
EMAIL

US Probation  
DISTRICT OF UTAH  
,

EMAIL



**COURT FILED**  
CLERK, U.S. DISTRICT COURT  
2005 JAN 28 A 10:30

DISTRICT OF UTAH

BY: \_\_\_\_\_  
MODIFY CLERK  
S OF RELEASE

: ORDER TO MODIFY CLERK  
 : CONDITIONS OF RELEASE  
 : 2:04-CR-378 TC

1. The defendant shall maintain residence at 7233 S. 700 E., Apt. 26, Midvale, Utah, and not change without permission of Pretrial Services.
2. The defendant shall maintain employment and not change without permission of Pretrial Services.
3. The defendant shall report to Pretrial Services as directed.
4. The defendant shall submit to drug testing as directed by Pretrial Services.
5. The defendant shall not possess firearms or dangerous weapons.

DATED this 27 day of January, 2005.

BY THE COURT:

Honorable David O. Nuffer  
United States District Judge



United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00378

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Colleen K. Coebergh, Esq.  
DRUG ENFORCEMENT ADMINISTRATION  
METROPOLITAN NARCOTICS TASK FORCE  
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EMAIL

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Todd A. Utzinger, Esq.  
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EMAIL

Stephanie Ames, Esq.  
32 EXCHANGE PL #101  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
/  
EMAIL

US Probation  
DISTRICT OF UTAH  
/  
EMAIL

RECEIVED CLERK

JAN 26 2005

U.S. DISTRICT COURT

RECEIVED

JAN 27 2005

OFFICE OF  
JUDGE TENA CAMPBELL

PHILIP S. FERGUSON (1063)  
ANNELIESE COOK BOOHER (9117)  
CHRISTENSEN & JENSEN, P.C.  
50 South Main Street, Suite 1500  
Salt Lake City, Utah 84144-0103  
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THOMAS M. SANFORD (*pro hac vice*)  
DOUGLAS R. IRVINE (*pro hac vice*)  
LEWIS BRISBOIS BISGAARD & SMITH LLP  
221 North Figueroa Street, Suite 1200  
Los Angeles, California 90012  
Telephone: (213) 250-1800  
Facsimile: (213) 250-7900

Attorneys for Defendant and Counterclaimant National Union  
Fire Insurance Company of Pittsburgh, PA

FILED  
CLERK U.S. DISTRICT COURT  
2005 JAN 28 A 10:31  
DISTRICT OF UTAH  
BY  
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

CLEARONE COMMUNICATIONS, INC.,  
EDWARD D. BAGLEY,

Plaintiffs,

vs.

LUMBERMENS MUTUAL CASUALTY  
COMPANY; NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH,  
PA,

Defendants.

And Related Counterclaims.

Case No. 2:04-CV-00119 TC

**ORDER FOR COMMISSION TO TAKE  
DEPOSITIONS OF COLIN AND  
GRAEME STEVENSON IN  
AUSTRALIA**

(Consolidated Cases)

Judge Tena Campbell

Magistrate Judge David Nuffer

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The motion of Defendant NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA ("National Union") for a commission to take the depositions of Colin Stevenson and Graeme Stevenson, residents of Blackburn, Victoria, Australia, was submitted on January <sup>DM</sup>26, 2005. Having considered the papers filed by all parties on the matter, including the stipulation of counsel for all parties, it appears to the Court that the testimony of Colin Stevenson and Graeme Stevenson will be material and relevant to the subject matter of this action, that the parties may attend the deposition by telephone or in person, and that it is necessary that a commission issue in order that National Union may take these witnesses' depositions in Australia; further, the parties may attend the depositions by videoconferencing if such videoconferencing does not interfere with the stenographic record and with the video and audio taping of the proceedings. Therefore,


IT IS ORDERED, that

1. The motion is GRANTED;
2. A commission will issue under the seal of this court:
  - i. Directing to Chris Moore of Clayton Utz, a law firm located in Melbourne, Australia ("Moore"), authorizing him to give oaths and conduct the depositions of Colin Stevenson and Graeme Stevenson on oral examination, and
  - ii. Directing Moore to cause the testimony of the witnesses to be

stenographically recorded, recorded by video and audio tape, and reduced to writing, to cause the deposition transcripts to be signed by the witnesses, and to certify such transcripts and video/audio tapes and return them to counsel for National Union, Douglas R. Irvine.

3. The parties may attend these depositions by telephone or in person. In addition, the parties may attend the depositions by videoconferencing provided that such a process does not interfere with the stenographic recording and the video/audio recording of the proceedings.

Dated: 28 June 2005

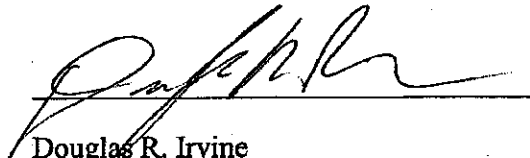
  
DAVID MUFFON  
U.S. DISTRICT JUDGE  
MAGISTRATE

APPROVED AS TO FORM:

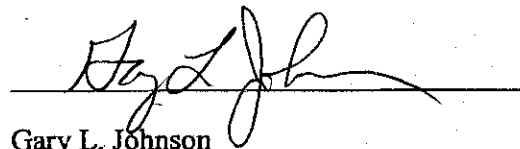
DATED: \_\_\_\_\_

Raymond J. Etcheverry  
Kent O. Roche  
PARSONS BEHLE & LATIMER  
Attorneys for Defendant/ Counterclaimant/Plaintiff  
ClearOne Communications, Inc. and for All  
Additional Defendant Other Than Bagley and  
Pierce

DATED: Jan. 24, 2005

  
Douglas R. Irvine  
LEWIS BRISBOIS BISGAARD & SMITH  
Attorneys for National Union Fire Insurance  
Company of Pittsburgh, Pennsylvania

DATED: Jan. 25, 2005

  
Gary L. Johnson  
Ramona E. Garcia  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Lumbermans Mutual Casualty  
Company

DATED: \_\_\_\_\_

Richard D. Burbidge  
Jefferson W. Gross  
Robert J. Shelby  
BURBIDGE & MITCHELL  
Attorneys for Edward D. Bagley and Michael A.  
Pierce

APPROVED AS TO FORM:

DATED: 1/25/05

Kent J Roche

Raymond J. Etcheverry  
Kent O. Roche  
PARSONS BEHLE & LATIMER  
Attorneys for Defendant/ Counterclaimant/Plaintiff  
ClearOne Communications, Inc. and for All  
Additional Defendant Other Than Bagley and  
Pierce

DATED: Jan. 24, 2005

Douglas R. Irvine

Douglas R. Irvine  
LEWIS BRISBOIS BISGAARD & SMITH  
Attorneys for National Union Fire Insurance  
Company of Pittsburgh, Pennsylvania

DATED: \_\_\_\_\_

\_\_\_\_\_

Gary L. Johnson  
Ramona E. Garcia  
RICHARDS, BRANDT, MILLER & NELSON  
Attorneys for Lumbermans Mutual Casualty  
Company

DATED: 1/25/04

Jefferson W. Gross

Richard D. Burbidge  
Jefferson W. Gross  
Robert J. Shelby  
BURBIDGE & MITCHELL  
Attorneys for Edward D. Bagley and Michael A.  
Pierce

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> day of January, 2005, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing: ORDER FOR COMMISSION TO DEPOSE COLIN AND GRAEME STEVENSON:

Gary L. Johnson  
Ramona E. Garcia  
RICHARDS BRANDT MILLER & NELSON  
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Raymond J. Etcheverry  
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Richard D. Burbidge  
Jefferson W. Gross  
Robert J. Shelby  
BURBIDGE & MITCHELL  
215 South State  
Suite 920  
Salt Lake City, Utah 84111

Wicki Linstead



United States District Court  
for the  
District of Utah.  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00119

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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Thomas M. Sanford, Esq.  
LEWIS BRISBOIS BISGAARD & SMITH LLP

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NEW YORK, NY 10038

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 28 A 10:31

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JAN 26 2005

DISTRICT OF UTAH

OFFICE OF  
JUDGE TENA CAMPBELL

BY: ~~IN THE~~ UNITED STATES DISTRICT COURT  
DEPUTY CLERK  
DISTRICT OF UTAH, CENTRAL DIVISION

RECEIVED CLERK

JAN 25 2005

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT SALT LAKE COUNCIL, INC.,  
BOY SCOUTS OF AMERICA,

Defendants.

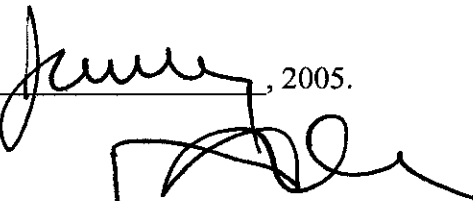
ORDER AMENDING  
SCHEDULING CONFERENCE  
ORDER

Civil No. 2:04CV00604 TC

U.S. DISTRICT COURT

The parties have jointly proposed to amend the Scheduling Conference Order dated August 2, 2004, as amended, specifically, the date by which Plaintiff is to add additional parties. The Court finds good cause exists to grant the request. The Scheduling Conference Order is, therefore, amended to extended the date by which Plaintiff is to add additional parties from January 30, 2005 to March 14, 2005.

DATED this 27 day of June, 2005.

  
David Nuffer, United States Magistrate Judge  
United States District Court, District of Utah

19

alt

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00604

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Eric A. Overby, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Mr. Robert R Wallace, Esq.  
KIRTON & MCCONKIE  
60 E S TEMPLE STE 1800  
SALT LAKE CITY, UT 84111-1004  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT  
IN THE UNITED STATES DISTRICT COURT  
2005 JAN 28 A 10:58  
DISTRICT OF UTAH - NORTHERN DIVISION  
DISTRICT OF UTAH

DOUGLAS J. WOOD,

Plaintiff,

vs.

ICON HEALTH & FITNESS, INC., and  
JOHN DOES 1 through 3, and JANE DOES  
1 through 3,

Defendants.

BY: \_\_\_\_\_  
DEPUTY CLERK

**ORDER**

Case No. 1:04-CV-0043 DB

Judge Dee Benson

Before the Court are two motions: 1) Plaintiff's Motion to Allow Additional Time to Complete Service of Process, and 2) a Motion to Dismiss for Untimely Service filed by Defendant ICON Health & Fitness, Inc. ("ICON"). It is well within the discretion of the Court to allow additional time to complete service of process. Plaintiff's motion is GRANTED, and ICON's motion is DENIED.

ICON has since waived service in this case but has yet to file an answer or otherwise respond to Plaintiff's complaint. Given the timing of this order relative to the waiver of service, ICON shall have twenty (20) days from the date of this order to respond to Plaintiff's complaint. All further time restrictions regarding the filing of pleadings shall be governed by the Federal Rules of Civil Procedure and the Rules of Practice for the United States District Court for the District of Utah. **IT IS SO ORDERED.**

DATED this 27<sup>th</sup> day of January, 2005.

  
Dee Benson  
United States District Judge

8

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cv-00043

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

David L. Cooley, Esq.  
31 FEDERAL AVE  
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JFAX 8,435,7523556

Marty Eugene Moore, Esq.  
BEARNSON & PECK  
74 W 100 N  
LOGAN, UT 84321  
EMAIL

FILED

CLERK, U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

2005 JAN 28 A. 10: 58

DISTRICT OF UTAH

ENGINEERING TECHNOLOGY, INC.,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,  
and SEALAND SERVICE, INC.,

Defendants.

BY: \_\_\_\_\_  
DEPUTY CLERK

**ORDER**

Case No. 2:98-CV-0063B

Judge Dee Benson

The Court issued an Order to Show Cause on January 28, 2004 requesting Plaintiff to update the Court on the status of this case. Plaintiff failed to respond to that order within the required time frame or notify the Court otherwise of its intention to pursue litigation. Nothing has occurred since January 28, 2004, in this case to convince the Court the parties intend to litigate this matter. Therefore, this case is **DISMISSED** without prejudice for failure to prosecute.

**IT IS SO ORDERED.**

DATED this 27<sup>th</sup> day of January, 2005.

  
Dee Benson  
United States District Judge

12

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:98-cv-00063

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Steven T Waterman, Esq.  
RAY QUINNEY & NEBEKER  
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Dennis C. Farley, Esq.  
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FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 31

A 8:18

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JAN 27 2005

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

BY: DEPUTY CLERK

U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

OSCAR GONZALEZ-ALVAREZ,

Defendant.

ORDER GRANTING MOTION TO  
WITHDRAW AS COUNSEL

Case No. 2:03 CR 0985 DKW

This matter has been reviewed by the Court on a Motion to Withdraw as Counsel filed by Viviana Ramirez, Assistant Federal Defender; the Court being fully advised and good cause appearing, IT IS HEREBY ORDERED:

Viviana Ramirez, Assistant Federal Defender, is hereby granted leave to withdraw as counsel of record for Defendant.

Dated this 28 day of January, 2005.

BY THE COURT:

*David K. Winder*

DAVID K. WINDER  
United States District Court Judge

32

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cr-00985

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. William L Nixon, Esq.  
US ATTORNEY'S OFFICE

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EMAIL

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UTZINGER & PERRETTA  
562 S MAIN ST 2ND FL  
BOUNTIFUL, UT 84010  
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United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

## United States District Court for the District of Utah

# **Petition and Order for Warrant for Offender Under Supervision**

CLERK, U.S. DISTRICT COURT

2005 JAN 31 A 8:18

Name of Offender: **MANUEL DE JESUS CRUZ-MENDEZ**Docket Number: **2:97-CR-00402-001**Name of Sentencing Judicial Officer: **Honorable David K. Winder**

DEPUTY CLERK

Date of Original Sentence: **March 6, 1998**Original Offense: **Reentry of Deported Alien**Original Sentence: **70 months custody, 36 months supervision**Type of Supervision: **Supervised Release**Supervision Began: **December 20, 2002**

## **PETITIONING THE COURT**

[ X ] To issue a warrant to be placed as a In custody:  
 detainer and toll the supervision term U.S. Marshal custody

## **CAUSE**

The probation officer believes that the offender has violated the conditions of supervision as follows:

**Allegation No. 1:** The defendant illegally reentered the United States and was found in the country on or about December 17, 2004. No information has been received to indicate that the defendant had legal permission to enter the country. On January 20, 2005, the defendant was named in a One-Count Indictment charging Reentry of Previously Removed Alien, a violation of 8 U.S.C. § 1326, Case Number 2:05-CR-00041.

I declare under penalty of perjury that the foregoing is true and correct



Karan D. Pace, Supervising U.S. Probation Officer

Date: January 25, 2005

## **THE COURT ORDERS:**

- ☒ The issuance of a warrant to be placed as a  
 detainer and tolling of the supervision term
- [ ] No action
- [ ] Other



Honorable David K. Winder  
 Senior United States District Judge

Date: 1-28-05



jmr

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:97-cr-00402

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

Mr. Mark K Vincent, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 28 P 4: 05

RECEIVED CLERK

JAN 12 2005

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BY: [Signature]  
CENTRAL DEPUTY CLERK DIVISION

---

KEN WALTERS, et al,	*	
Plaintiff,	*	<b>GARNISHEE ORDER</b>
	*	
	*	
VS.	*	
	*	
MERRICK YOUNG, INC.,	*	
	*	
Defendant,	*	
	*	<b>Civil No. 2:02 CV 1063 DB</b>
LAFARGE NORTH AMERICA, INC.,	*	
	*	
Garnishee,	*	
	*	

---

A Writ of Garnishment, directed to garnishee, has been issued and served upon the Garnishee. Pursuant to the Writ of Garnishment, the Garnishee has filed Answers to Interrogatories stating that at the time of the service of the Writ the Garnishee had in his possession or under his control personal property belonging to and due Defendant and that the Garnishee was indebted to Defendant in the sum of \$ 40,000.00. The Defendant has been notified of his right to a hearing but has not requested a hearing to determine exempt property.

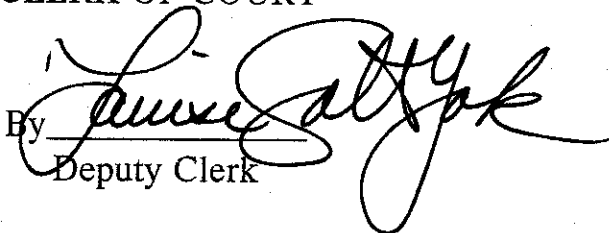
IT IS ORDERED that garnishee pay the sum of \$ 40,000.00 to:  
☐ Plaintiff      ☒ Attorney for the Plaintiff    ☐ Other  
and that the garnishee, upon payment of said sum, is relieved from any demands by

43

the Defendant for money or property delivered by the garnishee pursuant to this order.

DATED this 28<sup>th</sup> day of January 2005  
~~July 18 2004~~.

MARKUS B. ZIMMER  
CLERK OF COURT

By   
Deputy Clerk

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-01063

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert M. Jensen, Esq.  
JENKINS JENSEN & BAYLES LLP  
1240 E 100 S STE 9  
ST GEORGE, UT 84790  
EMAIL

Kenneth B. Grimes, Esq.  
PERKINS SCHWOBE & MCLACHLAN  
343 S 400 E  
SALT LAKE CITY, UT 84111

Darren K. Nelson, Esq.  
PARR WADDOUPS BROWN GEE & LOVELESS  
185 S STATE ST STE 1300  
PO BOX 11019  
SALT LAKE CITY, UT 84147  
EMAIL

# United States District Court District of Utah

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH

JAN 28 2005

BY MARKUS B. ZIMMER, CLERK  
DEPUTY CLERK

UNITED STATES OF AMERICA

vs.

Angela Heidi Scheering

JUDGMENT IN A CRIMINAL CASE  
(For Offenses Committed On or After November 1, 1993)

Case Number: 2:04-cr-00241-003 DB

Plaintiff Attorney: Kirk Lusty

Defendant Attorney: Edward K. Brass

Atty: CJA ☒ Ret ☐ FPD ☐

Defendant's Soc. Sec. No.: \_\_\_\_\_

Defendant's Date of Birth: \_\_\_\_\_

Defendant's USM No.: 11445-081

Defendant's Residence Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Country \_\_\_\_\_

01/27/2005

Date of Imposition of Sentence

Defendant's Mailing Address:

SAME

SAME

Country \_\_\_\_\_

THE DEFENDANT:

☒ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)  
which was accepted by the court.

☐ was found guilty on count(s)

COP 10/15/2004 Verdict \_\_\_\_\_

IV - Indictment

**Title & Section**

18USC§513(a) and  
18USC§2

**Nature of Offense**

Uttering or Possession Counterfeit Securities; and  
Aiding and Abetting

**Count**

**Number(s)**

IV

Entered on docket  
1/31/05 by:  
KYS  
Deputy Clerk

☐ The defendant has been found not guilty on count(s) \_\_\_\_\_

☒ Count(s) I and III (is)(are) dismissed on the motion of the United States.

**SENTENCE**

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of \_\_\_\_\_

Upon release from confinement, the defendant shall be placed on supervised release for a term of \_\_\_\_\_

☒ The defendant is placed on Probation for a period of 3 years  
The defendant shall not illegally possess a controlled substance.

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Defendant: Angela Heidi Scheering  
Case Number: 2:04-cr-00241-003 DB

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

### **SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION**

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. The defendant shall submit to drug/alcohol testing, and pay an initial \$115 fee and additional costs associated with confirmation testing of testing of positive results. If deemed appropriate by the Court and the probation office, the defendant will pay additional costs associated with confirmation testing of positive results reported to the Court.
2. The defendant shall participate in a mental health treatment program under a co-payment plan, as directed by the probation office.

### **CRIMINAL MONETARY PENALTIES**

#### **FINE**

The defendant shall pay a fine in the amount of \$ \_\_\_\_\_, payable as follows:

- ☐ forthwith.
- ☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☒ other:  
**No Fine Imposed**

- ☐ The defendant shall pay interest on any fine more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).
- ☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), it is ordered that:
- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

#### **RESTITUTION**

The defendant shall make restitution to the following payees in the amounts listed below:

Defendant: Angela Heidi Scheering  
Case Number: 2:04-cr-00241-003 DB

Name and Address of Payee  
\*\*\*\*See Attached Sheet\*\*\*\*

Amount of Loss  
13,287.25

Amount of  
Restitution Ordered  
13,287.25

Totals: \$ 13,287.25 \$ 13,287.25

(See attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☐ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other:

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until \_\_\_\_\_ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

#### SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of \$ 100.00, payable as follows:

☒ forthwith.

☐ \_\_\_\_\_

**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

#### PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

#### RECOMMENDATION

☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:

Defendant: Angela Heidi Scheering  
Case Number: 2:04-cr-00241-003 DB

**CUSTODY/SURRENDER**

- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district at \_\_\_\_\_ on \_\_\_\_\_.
- ☐ The defendant shall report to the institution designated by the Bureau of Prisons by \_\_\_\_\_ Institution's local time, on \_\_\_\_\_.

DATE:

Jan. 28, 2005

Dee Benson  
Dee Benson  
United States District Judge

Defendant: Angela Heidi Scheering  
Case Number: 2:04-cr-00241-003 DB

**RETURN**

I have executed this judgment as follows:

---

---

---

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
Deputy U.S. Marshal

[illegible]

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00241

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Kirk C. Lusty, Esq.  
US POSTAL SERVICE  
LAW DEPT WE AREA  
9350 S 150 E #800  
SANDY, UT 84070-2702  
EMAIL

Vanessa M. Ramos-Smith, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

Todd A. Utzinger, Esq.  
UTZINGER & PERRETTA  
562 S MAIN ST 2ND FL  
BOUNTIFUL, UT 84010  
EMAIL

Mr. Edward K. Brass, Esq.  
175 E 400 S STE 400  
SALT LAKE CITY, UT 84111  
EMAIL

Mr. Edwin S. Wall, Esq.  
WALL LAW OFFICES  
8 E BROADWAY STE 500  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
/  
EMAIL

US Probation  
DISTRICT OF UTAH  
/  
EMAIL

# United States District Court District of Utah

UNITED STATES OF AMERICA

vs.

Michael Travis Powers

**JUDGMENT IN A CRIMINAL CASE**  
(For Offenses Committed On or After November 1, 1987)

Case Number: **2:04-cr-00241-004 DB**

Plaintiff Attorney: **Kirk C. Lusty**

Defendant Attorney: **Edwin S. Wall**

Atty: CJA ☒ Ret ☐ FPD ☐

Defendant's Soc. Sec. No.: \_\_\_\_\_

Defendant's Date of Birth: \_\_\_\_\_

Defendant's USM No.: **11446-081**

Defendant's Residence Address: \_\_\_\_\_

Country: \_\_\_\_\_

**01/27/2005**

Date of Imposition of Sentence

Defendant's Mailing Address:

**SAME**

**SAME**

Country: \_\_\_\_\_

THE DEFENDANT:

☒ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s)  
which was accepted by the court.

☐ was found guilty on count(s)

COP **10/25/2004** Verdict \_\_\_\_\_

**IV- Indictment**

**Title & Section**

18USC§513(a)

18USC§2

**Nature of Offense**

Uttering or Possession Counterfeit Securities; Aiding  
and Abetting

**Count**

**Number(s)**

IV

Entered on docket

**1/31/05** by:

**KYS**

Deputy Clerk

☐ The defendant has been found not guilty on count(s)

☒ Count(s) **I and III** (is)(are) dismissed on the motion of the United States.

## SENTENCE

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of

Upon release from confinement, the defendant shall be placed on supervised release for a term of

☒ The defendant is placed on Probation for a period of **3 years.**  
The defendant shall not illegally possess a controlled substance.

FILED IN UNITED STATES DISTRICT  
COURT, DISTRICT OF UTAH  
JAN 28 2005  
BY MARKUS B. ZIMMER, CLERK  
DEPUTY CLERK

89

Defendant: Michael Travis Powers  
Case Number: 2:04-cr-00241-004 DB

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

### SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. The defendant will submit to drug/alcohol testing as directed by the United States Probation Office. If testing reveals illegal drug use the defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan as directed by the United States Probation Office.

2. The defendant shall refrain from incurring new credit charges or opening additional lines of credit unless he is in compliance with any established payment schedule and obtains approval of the probation office.

3. The defendant shall not use or possess alcohol.

### CRIMINAL MONETARY PENALTIES

#### FINE

The defendant shall pay a fine in the amount of \$ \_\_\_\_\_, payable as follows:

- ☐ forthwith.
- ☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☒ other:  
No Fine Imposed

☐ The defendant shall pay interest on any fine more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).

☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), **it is ordered that:**

- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

#### RESTITUTION



Defendant: Michael Travis Powers  
Case Number: 2:04-cr-00241-004 DB

The defendant shall make restitution to the following payees in the amounts listed below:

<u>Name and Address of Payee</u>	<u>Amount of Loss</u>	<u>Amount of Restitution Ordered</u>
SEE ATTACHED SHEET	4,339.62	4,339.62

Totals: \$ 4,339.62 \$ 4,339.62

(See attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☒ Restitution is payable as follows:

☒ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other: \_\_\_\_\_

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until \_\_\_\_\_ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

#### SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of \$ 100.00, payable as follows:

☒ forthwith.

☐ \_\_\_\_\_

**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

#### PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

#### RECOMMENDATION

☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons: \_\_\_\_\_

Defendant: Michael Travis Powers  
Case Number: 2:04-cr-00241-004 DB

---

**CUSTODY/SURRENDER**

- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district at \_\_\_\_\_ on \_\_\_\_\_.
- ☐ The defendant shall report to the institution designated by the Bureau of Prisons by \_\_\_\_\_ Institution's local time, on \_\_\_\_\_.

DATE:

Jan. 28 2005

  
Dee Benson

United States District Judge

Defendant: Michael Travis Powers  
Case Number: 2:04-cr-00241-004 DB

**RETURN**

I have executed this judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
Deputy U.S. Marshal

# MICHAEL POWERS RESTITUTION - Attachment B

Account Holder	ID'd Date	Bank	Account No.	Check No.	Payee	Loss Amount	Financial Victim
Lifetime Products Inc POB 160010 Clearfield UT 84017	5/31/02	Wells Fargo	0510170848	683491	Brandon Bishop	486.14	Kroger Check Recovery POB 30650 SLC UT 84130
Lifetime Products Inc POB 160010 Clearfield UT 84017	5/31/02	Wells Fargo	0510170848	181126	Joseph Valentine	299.37	Kroger Check Recovery POB 30650 SLC UT 84131
Lifetime Products Inc POB 160010 Clearfield UT 84021	5/31/02	Wells Fargo	0510170848	181120	Joseph Valentine	498.71	K roger Check Recovery POB 30650 SLC UT 84130
Lifetime Products Inc POB 160010 Clearfield UT 84018	5/31/02	Wells Fargo	0510170848	181013	Joseph Valentine	485.33	K roger Check Recovery POB 30650 SLC UT 84131
Lifetime Products Inc POB 160010 Clearfield UT 84019	5/31/02	Wells Fargo	0510170848	181117	Joseph Valentine	487.66	K roger Check Recovery POB 30650 SLC UT 84132
Lifetime Products Inc POB 160010 Clearfield UT 84020	5/31/02	Wells Fargo	0510170848	181312 181324	John Jones Tammy Fox	1,145.21	Athena Fox 240 N. 180 e. #24 Ogden, UT 84404
Lifetime Products Inc POB 160010 Clearfield UT 84023	5/31/02	Wells Fargo	0510170848	683491	Brandon Bishop	486.14	K roger Check Recovery POB 30650 SLC UT 84130
Lifetime Products Inc POB 160010 Clearfield UT 84023	5/31/02	Wells Fargo	0510170848	694709	Jessica Witt	451.06	K roger Check Recovery POB 30650 SLC UT 84130
						\$ 4,339.62	

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00241

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Kirk C. Lusty, Esq.  
US POSTAL SERVICE  
LAW DEPT WE AREA  
9350 S 150 E #800  
SANDY, UT 84070-2702  
EMAIL

Vanessa M. Ramos-Smith, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

Todd A. Utzinger, Esq.  
UTZINGER & PERRETTA  
562 S MAIN ST 2ND FL  
BOUNTIFUL, UT 84010  
EMAIL

Mr. Edwin S. Wall, Esq.  
WALL LAW OFFICES  
8 E BROADWAY STE 500  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
/  
EMAIL

US Probation  
DISTRICT OF UTAH  
/  
EMAIL

**U.S. DISTRICT COURT**

HONORABLE DEE BENSON  
United States District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that I mailed/delivered a true and correct copy of the foregoing Order Amending Release Conditions , postage prepaid, this 26<sup>th</sup> day of January, 2005, to the following:

David Backman  
Assistant U. S. Attorney  
185 South State Street #400  
Salt Lake City, Utah 84111

Myrland Henderson

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00353

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

David F. Backman, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Mr. Ronald J. Yengich, Esq.  
YENGICH RICH & XAIZ  
175 E 400 S STE 400  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL



**United States District Court**  
**District of Utah**

FILED  
CLERK U.S. DISTRICT COURT  
JAN 28 A 10:59  
DISTRICT CLERK

**UNITED STATES OF AMERICA**

**vs.**

**JUDGMENT IN A CRIMINAL CASE**

(For Offenses Committed On or After November 1, 1987)

**Joshua Stephen Demmitt**

Case Number: **2:04-CR-00659-001 JTG**

Plaintiff Attorney: **Robert Lunnan**

Defendant Attorney: **Clayton Sims**

Atty: CJA \_\_\_ Ret ☒ FPD \_\_\_

Defendant's Soc. Sec. No.: \_\_\_\_\_

Defendant's Date of Birth: \_\_\_\_\_

**01/18/2005**

Date of Imposition of Sentence

Defendant's USM No.: **NONE**

Defendant's Residence Address: \_\_\_\_\_

Defendant's Mailing Address: \_\_\_\_\_

**SAME**

Country **USA**

Country \_\_\_\_\_

THE DEFENDANT:

☒ pleaded guilty to count(s)

COP **10/01/2004** Verdict \_\_\_\_\_

**One of the Indictment**

☐ pleaded nolo contendere to count(s)  
which was accepted by the court.

☐ was found guilty on count(s)

**Title & Section**  
**18 USC §§ 844(i)**

**Nature of Offense**  
**Destruction of Property by Fire**

**Count**  
**Number(s)**  
**1**

☐ The defendant has been found not guilty on count(s) \_\_\_\_\_

☐ Count(s) \_\_\_\_\_ (is)(are) dismissed on the motion of the United States.

**SENTENCE**

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of

**30 Months**

Upon release from confinement, the defendant shall be placed on supervised release for a term of

**24 Months**

☐ The defendant is placed on Probation for a period of \_\_\_\_\_  
The defendant shall not illegally possess a controlled substance.

12

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

**SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION**

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. The defendant shall maintain full-time, verifiable employment or participate in academic or vocational development throughout the term of supervision as deemed appropriate by the USPO.
2. The defendant will submit to drug/alcohol testing as directed by the probation office, and pay a one-time \$115 fee to partially defer the costs of collection and testing. If testing reveals illegal drug use, the defendant shall participate in drug and/or alcohol abuse treatment under a co-payment plan, as directed by the USPO.
3. The defendant shall submit his person, residence, office or vehicle to a search, conducted by a USPO at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

**CRIMINAL MONETARY PENALTIES**

**FINE**

The defendant shall pay a fine in the amount of \$ NONE , payable as follows:

- ☐ forthwith.
- ☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☐ other: \_\_\_\_\_

- ☐ The defendant shall pay interest on any fine more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).

- ☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), it is ordered that:

- ☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

### RESTITUTION

The defendant shall make restitution to the following payees in the amounts listed below:

<u>Name and Address of Payee</u>	<u>Amount of Loss</u>	<u>Amount of Restitution Ordered</u>
Brigham Young University Physical Facilities Division, Attn: Roy Peterman Claim #6356596 122 Thomas House Provo, UT 84602-1008	75,898.00	75,898.00
<b>Totals:</b>	<b>\$ 75,898.00</b>	<b>\$ 75,898.00</b>

(See attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☒ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☒ other:

**Restitution is due immediately. Restitution shall be paid jointly and severally with co-dft, Mr. Harrison Burrows Case No. 2:04-CR-00495-001 DKW. Restitution shall be paid at a minimum rate of \$100.00, upon release from incarceration. Interest shall not accrue on the restitution amount.**

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until \_\_\_\_\_ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

### SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of \$ 100.00, payable as follows:

☒ forthwith.

☐ \_\_\_\_\_

**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

**PRESENTENCE REPORT/OBJECTIONS**

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

**DEPARTURE**

✕ The Court grant the Motion for Departure pursuant to 18 U.S.C. 3553(c)(2), the Court enters its reasons for departure:

The Court grants the USA's 5K1.1 motion for downward departure.

**RECOMMENDATION**

✕ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant serve his sentence at the Sheridan Oregon facility.

**CUSTODY/SURRENDER**

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district at \_\_\_\_\_ on \_\_\_\_\_.

✕ The defendant shall report to the institution designated by the Bureau of Prisons by 12:00 Noon Institution's local time, on February 15, 2005.

DATE:

January 27, 2005 J. Thomas Greene  
J. Thomas Greene  
United States District Judge

Defendant: Joshua Stephen Demiitt  
Case Number: 2:04-CR-00659-001 JTG

Page 5 of 5

## RETURN

I have executed this judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
Deputy U.S. Marshal

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00659

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Robert C Lunnen, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Clayton A. Simms, Esq.  
OVERSON & SIMMS LLC  
215 S STATE ST STE 960  
SALT LAKE CITY, UT 84111  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 A 10:31

DISTRICT OF UTAH

BY: DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA

Plaintiff,

vs.

ISIDORE THEODORE BARRERA

Defendant.

ORDER DENYING MOTION  
TO QUASH WARRANT

Case No: 2:04 CR 841 DB  
N-04-135-M

District Judge Dee Benson

Magistrate Judge David Nuffer

The Plaintiff has moved to quash the warrant issued in the magistrate case<sup>1</sup> because another warrant<sup>2</sup> has issued in the case file opened subsequent to the indictment. After conferring with the U.S. Marshal's office, and determining that it is their preference to leave both warrants outstanding rather than risk the possibility that a recall of one warrant might be misinterpreted as a recall of both warrants,

IT IS HEREBY ORDERED that the Motion to Quash Warrant is DENIED.

January 26, 2005.

BY THE COURT:



David Nuffer  
U.S. Magistrate Judge

<sup>1</sup> Docket no. 2, filed May 12, 2004, in N-04-135.

<sup>2</sup> Docket no. 5, filed December 16, 2004, in 2:04 CR 841 DB.

9

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00841

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

Leshia M. Lee-Dixon, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL



FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 25 A 10:32

Order submitted by:

PAUL M. WARNER, United States Attorney (#3389) *VB*  
JAN N. ALLRED, Assistant United States Attorney (#4741) *VB*  
185 South State Street, #400  
Salt Lake City, Utah 84111  
Telephone: (801) 524-5682

RECEIVED CLERK

JAN 20 2005

U.S. DISTRICT COURT

Attorneys for Defendants

---

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, NORTHERN DIVISION

---

ROGER PULIDO,	:	Civil No. 1:02CV152DB
Plaintiff,	:	
v.	:	<b>ORDER FOR ENLARGEMENT OF TIME</b>
DEPARTMENT OF THE AIR FORCE,	:	Judge Dee Benson
et al.	:	
Defendants.	:	Magistrate Judge David Nuffer

---

The above matter came before the Court on the Defendants' Motion for Enlargement of Time. Based upon that motion and pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, the Court hereby

ORDERS that the Motion is granted and the parties may have until February 15, 2005 to file dispositive motions in this matter.

42

DATED this 24 day of January, 2005.

BY THE COURT:

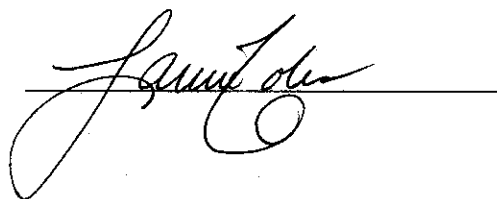
A handwritten signature in black ink, appearing to read 'DN', written over a horizontal line.

Hon. David Nuffer  
Magistrate Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office and that a copy of the foregoing proposed **ORDER FOR ENLARGEMENT OF TIME** was mailed, postage prepaid, to all parties named below, this 20<sup>th</sup> day of January, 2005.

Roger Pulido  
763 27<sup>th</sup> Street  
Ogden, UT 84403-0262

A handwritten signature in cursive script, appearing to read "Roger Pulido", is written over a horizontal line.

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:02-cv-00152

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

Ms. Jan N. Allred, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Telin W. Ozier, Esq.  
AIR FORCE LEGAL SERVICES AGENCY  
GENERAL LITIGATION SERVICES AGENCY  
1501 WILSON BLVD RM 706  
ARLINGTON, VA 22209-2403

Roger Pulido  
3025 ADAMS AVE APT 21  
OGDEN, UT 84401

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 A 10:58

DIST. CLERK UTAH

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JESSY TONY GURULE,

Defendants.

BY:  
DEPUTY CLERK

**ORDER**

Case No. 2:97-CR-220 DB

Judge Dee Benson


Defendant was resentenced in the above-captioned case on April 29, 1999 to 80 months in prison to be followed by 36 months of supervised release. Along with the prison sentence, Defendant was fined \$7,500 and ordered to pay restitution in the amount of \$3,070. While incarcerated, Defendant was indicted for escape in the District of Utah (case no. 2:03-CR-237, Judge Winder presiding) and later sentenced to 30 months in prison to be followed by 36 months of supervised release that would run concurrently with the previous supervised release sentence.

Presently before the Court is Defendant's pro se motion, written to the Court on November 8, 2004, to defer further payments toward the fine and restitution amounts until he is released from custody. Defendant is currently scheduled for release on July 27, 2005. There being good cause appearing, Defendant's motion is GRANTED. Defendant's obligation to pay the fine and restitution in the above-captioned case is hereby deferred until Defendant has been released from custody. Once released, Defendant shall resume making payments in accordance with the rate and schedule to be determined by the Federal Bureau of Prisons.

47

**IT IS SO ORDERED.**

DATED this 27<sup>th</sup> day of January, 2005.

  
\_\_\_\_\_  
Dee Benson  
United States District Judge

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:97-cr-00220

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

Leshia M. Lee-Dixon, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

United States District Court  
for the  
District of Utah  
January 31, 2005

\*\*\*\*\*MAILING CERTIFICATE OF THE CLERK\*\*\*\*\*

RE: USA V Jessy Tony Gurule  
2:97cr220 DB

Jessy Gurule  
04047-081  
Federal Correctional Institution  
PO Box 6000  
Florence, CO 81226-6000

---

Kirsten Stillgebauer,



FILED  
DISTRICT COURT  
JUN 28 P 2:20  
CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, NORTHERN DIVISION

\*\*\*\*\*

DONNA M. HOLMAN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

---

UNITED STATES OF AMERICA,

Counterclaim Plaintiff,

vs.

DONNA M. HOLMAN and HYRUM  
W. SMITH,

Counterclaim Defendants.

\*\*\*\*\*

Civil No. 1:02-CV-77J

**MEMORANDUM OPINION AND  
ORDER**

**FACTUAL AND PROCEDURAL HISTORY**

Donna M. Holman filed her complaint against the United States of America on June 13, 2002, civil no. 1:02-CV-77, in an effort to quiet title to certain real property and enjoin tax collection against her by the United States government. The quiet title action seeks to remove two nominee tax liens that purportedly attach to a parcel of real property informally known as 177 West 1500 North, Centerville, Utah 84014 (the

“subject property”).<sup>1</sup> The subject property is titled in the names of plaintiff Donna M. Holman (“Mrs. Holman”) and counterclaim defendant Hyrum W. Smith (“Mr. Smith”). The United States of America (“United States”) answered Mrs. Holman’s complaint and counterclaimed against Mrs. Holman and Mr. Smith, asserting that each of them holds title to the subject property as nominees for the benefit of Mrs. Holman’s husband, Kenneth T. Holman (hereinafter “Mr. Holman”), and that Mr. Holman is the real owner of the property regardless of what the record title shows. The United States brought a separate action against Mr. Holman seeking judgment for his tax liabilities. (See Complaint, filed 06/19/2002, civil no. 1:02-CV-80, (dkt. no. 1).) On October 11, 2002, the action against Mr. Holman was consolidated with this action under civil no. 1:02-CV-70. (See Order, dated 10/11/2002 (dkt. no. 11).) On March 9, 2004, this Court granted judgment against Mr. Holman, in the sum of \$820,833.13, plus interest. (See Order, dated 3/9/2004 (dkt. no. 59).)

On December 6, 2004, Mrs. Holman filed her trial brief (“Pl.’s Trial Brief”) (dkt. no. 68). On the same day, the United States filed its trial brief (“U.S. Trial Brief”) dated 12/6/2004 (dkt. no. 69). The matter was tried before the court on

---

<sup>1</sup>The property is formally described as:  
All of LOT 8 and West 1.5 feet of LOT 7, SMOOT FARM ESTATES  
SUBDIVISION, PLAT “A,” a subdivision of part of Section 6, Township 2 North,  
Range 1 East, Salt Lake Meridian, in the City of Centerville, according to the  
official plat thereof. The covenant of warranty herein contained shall not be  
effective as to the South 2.66 feet of said property, which is Quit-Claimed only.

December 10, 2004. (*See Minute Entry*, dated 12/10/2004 (dkt. no. 70).) Thomas N. Thompson appeared on behalf of plaintiff and counterclaim defendant, Mrs. Holman. Anton L. Janik appeared on behalf of the defendant and counterclaim plaintiff, the United States. D. Williams Ronnow appeared on behalf of counterclaim defendant, Mr. Smith. At trial, after Mrs. Holman rested her case-in-chief, the United States moved to dismiss plaintiff's complaint (labeled as a motion for a "directed verdict") and the Court reserved upon the motion. Following closing arguments, the Court took the entire matter under advisement. (*See Minute Entry*, dated 12/10/2004 (dkt. no. 70).)

### **DISCUSSION**

Mrs. Holman claims that the only remaining issue for determination by the Court is whether she holds any interest in the subject property for the benefit of her husband, Mr. Holman. (*See PI's Trial Brief*, at 2.) On or about April 15, 2002, two Notices of Federal Tax Lien were filed against the subject property with the County Recorder of Davis County claiming Donna M. Holman and Hyrum W. Smith were nominees and/or transferees of Kenneth T. Holman of the subject property.

Mrs. Holman argues that she and Mr. Smith own the subject property, each has a one-half undivided interest,<sup>2</sup> and the IRS nominee tax liens against her and Mr. Smith

---

<sup>2</sup>Mrs. Holman and Mr. Smith are "record owners" and hold title to the property as tenants in common.

cannot and should not attach to the subject property and should be removed. The United States claims that Mrs. Holman and Mr. Smith hold title to the subject property as nominees for Mr. Holman, that the nominee federal tax liens attach to Mr. Holman's interest and ought to be foreclosed, and the subject property sold in accordance with 26 U.S.C. § 7403 and 28 U.S.C. § 2001 (2000).

Title 26 of the United States Code, Section 7403 describes an action to enforce lien or to subject property to payment of tax in pertinent part:

(a) **Filing.**— In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. . . .

(b) **Parties.**— All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) **Adjudication and decree.**— The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein. . . and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property. .

\* \* \* \*

26 U.S.C.A. § 7403 (2002) (emphasis added).<sup>3</sup>

---

<sup>3</sup>The Tenth Circuit has interpreted Section 7403 as conferring flexibility and broad discretion upon the courts in fashioning a remedy thereunder. As the term "may" in subsection (c) implies, this discretion and flexibility extends to the decision whether or not to order foreclosure once the validity of the lien has been established. *United States v. Eaves*, 499 F.2d 869, 871 (10th Cir. 1974).

**I. Kenneth T. Holman's Interest in the Subject Property**

The bedrock question is whether Mr. Holman has an interest in the property. There are five factors which support a finding that a person holds real property as a "nominee" of another. *See United States v. Reed*, 168 F.Supp.2d 1266, 1269 (D.Utah 2001): (i) the taxpayer exercises dominion and control over the property while the property is in the nominee's name; (ii) the nominee paid little or no consideration for the property; (iii) the taxpayer placed the property in the nominee's name in anticipation of a liability or lawsuit; (iv) a close relationship exists between the taxpayer and the nominee; and (v) the taxpayer continues to enjoy the benefits of the property while the property is in the nominee's name.

**A. Hyrum Smith Holds Record Title to the Subject Property Solely As A Nominee of Kenneth T. Holman.**

Mr. Smith testified at trial that while his name appears on the record title, he claims no interest in the subject property, and considers that he has not had an interest in that property since its initial transfer to the Holmans in 1991, subject to the then existing mortgage. Mr. Smith testified that he agreed to join Mrs. Holman on the Quit-Claim Deed and Deed of Trust concerning the subject property in order to comply with the provisions of his mortgage company request and to assist the Holmans in their efforts to refinance the subject property. Mrs. Holman was financially unable to qualify individually for a new mortgage loan, and Mr. Holman was unable to qualify

for a mortgage loan due to tax liens and a poor credit rating. Mr. Smith testified that all of the negotiations and discussion regarding transfers, financing, and subsequent refinancing of the subject property took place between him and Mr. Holman, that he never had any such discussions with Mrs. Holman, and that he does not recall anything other than rare social interactions with Mrs. Holman. On October 19, 1993, Mrs. Holman executed a Quit-Claim Deed transferring the subject property to herself and Mr. Smith. On that same day, Mrs. Holman and Mr. Smith executed a Deed of Trust to secure a promissory note signed by Mrs. Holman and Mr. Smith to the new mortgage company to pay off the old mortgage.

Mr. Smith has made no payment of the new mortgage loan nor any other expense connected with the purchase or upkeep of the subject property.

Notably, on August 14, 2003, both the United States and Mr. Smith signed and filed a stipulated request for judgment that Hyrum W. Smith owned title to the subject property solely as a nominee for Kenneth T. Holman. (Stipulation for Entry of Judgment, filed 08/14/2003 (dkt. no. 36).)

These relevant facts demonstrate that Mr. Smith is a record title holder merely as a nominee for Mr. Holman and thus Mr. Holman has at least a one-half undivided interest in the subject property.

B. Donna Holman Owns a One-Half Undivided Interest in the Subject Property.

The Utah legislature recognized the inequitable position of a wife at common law and in 1898 enacted the Married Woman's Act. *See* Rev. Stat. of Utah 1898, §§ 1198 to 1207, now found at Ut. Code Ann. §§ 30-2-1 to -10 (1998). The Married Woman's Act relieved a married woman of the disabilities of coverture and granted her status equal to that of an unmarried woman. *W.W. Clyde v. Dyess*, 126 F.2d 719, 722 (10th Cir. 1942). The 1998 versions of Utah Code Section 30-2-1 mirrors Art. XXII, § 2 of the Utah Constitution which found its origin in territorial laws, as well as the Constitution of 1896 upon statehood.

Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried.

Ut. Code Ann. § 30-2-1, Art. XXII, § 2 (1998) (emphasis added). However, Laws 1997, ch. 222, § 1 repealed Ut. Code Ann. § 30-2-1 effective January 1, 1999, conditioned on the repeal of Utah Constitution, Article XXII, Section 2, as proposed by Laws 1997, H.J.R. 8 § 1. The Resolution was passed by the Legislature and approved by the electorate.<sup>4</sup> The constitutional provision and the statute no longer exist which, in the minds of some, suggests the property rights of married women may once again be

---

<sup>4</sup>*See* Ut. Code Ann. § 30-2-1, and Art. XXII, § 2 (Supp. 2004).

vulnerable. Here, however, the United States pursues a theory of nominee liability against Mrs. Holman.

The United States argues that the evidence demonstrated the five factors required for nominee status. Generally, (i) Mr. Holman exercises dominion and control over the property while the property is in Mrs. Holman's name; (ii) Mrs. Holman paid little or no monetary payments on for the property; (iii) Mr. Holman placed the property in Mrs. Holman's name in anticipation of a liability or lawsuit; (iv) a close relationship exists between Mr. and Mrs. Holman; and (v) Mr. Holman continues to enjoy the benefits of the property while the property is in Mrs. Holman's name.

Specifically, Mr. Holman provided the vast majority of the funds used to pay the mortgage and household expenses, while Mrs. Holman had little or no personal income; Mr. Holman paid household expenses through Mrs. Holman either by writing a check from his account to his wife's account, or by directly depositing his wages into her account which funds Mrs. Holman would then use to pay on the mortgage and pay household expenses; Mr. Holman received the benefit of the mortgage interest deduction by claiming the interest paid on the mortgage against the Holman's joint income, which for 9 of the 11 years consisted of Mr. Holman's earnings; Mr. Holman paid \$12,797.94 in closing costs for the 1993 refinancing of the subject property's mortgage; Mr. Holman received the benefit of other transactions based in part on his acknowledgment of the subject property as his asset. Mrs. Holman undertook to pay



the existing mortgage for the subject property at its initial transfer; Mr. Holman provided Mr. Smith with a rent-free apartment in a building owned by a corporation in which Mr. Holman was the sole shareholder.

Bonnie Melendez, an officer for the Internal Revenue Service testified that it is the ordinary practice of the IRS, if they suspect that a nontaxpayer is using a nominee to escape forfeiture of property, to serve a form summons on the utilities companies servicing that property to release to the IRS the name on the utilities bill. In this case, according to Melendez, the IRS suspected a nominee situation, and on January 2, 2002, the IRS served a form summons on the utilities company PacifiCorp servicing the subject property. PacifiCorp released that Kenneth T. Holman's name was the name listed on the utilities bill. (*See Defendant's Exhibit Y.*)

However, in *United States v. Reed*, the five factors considered by the courts regarding nominee status must be present in a specific "context," namely:

Property transferred from a delinquent taxpayer to a nominee is subject to the collection of the taxpayer's tax liability. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350-51 (1977).

*Reed*, 168 F.Supp.2d 1268 (emphasis added). Thus, although the evidence may support the aforementioned five factors, it is the "context" of a *transfer* of the subject property from Mr. Holman to Mrs. Holman which has not occurred. Mr. Smith, not Mr. Holman transferred the subject property to Mrs. Holman in 1991. Mrs. Holman transferred by quit-claim to herself and Mr. Smith to perfect refinancing in 1993. And

it was at this point that Mr. Smith was Mr. Holman's nominee. Mrs. Holman could hold property in her name even if payments on that property were made by her husband by way of gift, or in consideration of love and affection, or by way of his legal duty of support. Mr. Smith, as nominee, qualifies for neither.

The Court finds that Mr. and Mrs. Holman own the subject property as tenants in common each with a one-half undivided interest in the whole. Sale of the subject property must be limited to Mr. Holman's undivided one-half interest in the whole. *See generally U.S. v. Eaves*, 499 F.2d 869 (10th Cir. 1974). As against the United States, title is quieted as to Mrs. Holman's undivided one-half interest.

The Utah Uniform Probate Code states that a wife has an inchoate interest in her husband's interest in realty, namely, one-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife made no relinquishment of her rights, should she survive him. Ut. Code Ann. § 75-2-202 (Supp. 2004).<sup>5</sup>

## **II. The United States' Request for Foreclosure**

The United States counterclaimed that the nominee federal tax lien attached to Mr. Holman's interest ought to be foreclosed, and the subject property sold in accordance with 26 U.S.C. § 7403 and 28 U.S.C. § 2001 (2000). Such would

---

<sup>5</sup>Where a taxpayer and wife held property as tenants in common, federal tax lien could be enforced by sale of property and retention by government of only that portion of proceeds attributable to taxpayer's interest. *See U.S. v. Kocher*, 329 F. Supp. 1079 (S.D.N.Y. 1971).

ordinarily be granted. However, it appears to the Court that Part (b) of Section 7403 may not have been complied with. *See* 26 U.S.C. § 7403(b) (2000). There is obviously a security interest held by the new mortgage lender for the 1993 refinancing and there may be other interests of record. The best the Court can do at this point is to declare the interest of Mr. Holman and deny the motion to foreclose, leaving for another day the question of foreclosure.

IT IS HEREBY ORDERED that Hyrum Smith holds record title to a one-half undivided interest in the real property located at 177 West 1500 North, Centerville, Utah 84014 solely as a nominee for Kenneth T. Holman, who is the actual and beneficial owner thereof.

IT IS FURTHER ORDERED that the United States' Motion for a "Directed Verdict" is DENIED.

IT IS FURTHER ORDERED that Donna Holman's request for declaratory relief is GRANTED IN PART in that she is the owner as tenant in common to a one-half undivided interest in the subject property.

IT IS FURTHER ORDERED that the United States request to foreclose on the nominee lien against Donna Holman is DENIED.

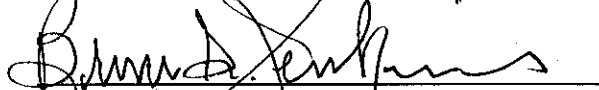
IT IS FURTHER ORDERED that the United States request to foreclose on the nominee lien on the subject property beneficially owned by Kenneth T. Holman is DENIED at this time subject to further action by the United States pursuant to Title 26

of the United States Code Section 7403(b) (2000).

Let judgment be entered accordingly.

DATED this 28 day of January, 2005.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", is written over a horizontal line.

BRUCE S. JENKINS

United States Senior District Judge

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:02-cv-00077

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. D. Williams Ronnow, Esq.  
JONES WALDO HOLBROOK & MCDONOUGH  
301 N 200 E STE 3-A  
ST GEORGE, UT 84770  
JFAX 8,435,6285225

Hyrum W. Smith  
150 WEST 1400 NORTH  
GUNLOCK, UT 84733

Paul T. Moxley, Esq.  
HOLME ROBERTS & OWEN LLP  
299 S MAIN ST STE 1800  
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EMAIL

Jeannette F. Swent, Esq.  
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,  
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US DEPARTMENT OF JUSTICE  
555 4TH STREET NW  
WASHINGTON, DC 20001  
EMAIL

Anton L. Janik Jr., Esq.  
US DEPARTMENT OF JUSTICE  
TAX DIVISION  
PO BOX 683  
BEN FRANKLIN STATION  
WASHINGTON, DC 20044

James C. Haskins, Esq.  
HASKINS & ASSOCIATES  
357 S 200 E STE 300  
SALT LAKE CITY, UT 84111-2827  
EMAIL

Robert L. Janicki, #5493  
Peter C. Schofield, #9447  
STRONG & HANNI  
*Attorneys for Defendant*  
*APCO Institute, Inc.*  
3 Triad Center, Suite 500  
Salt Lake City, UT 84180  
Telephone: (801) 532-7080  
Facsimile: (801) 596-1508

RECEIVED  
FILED  
CLERK, U.S. DISTRICT COURT  
JAN 28 2005  
OFFICE OF U.S. DISTRICT JUDGE  
BRUCE S. JENKINS  
DEPUTY CLERK

RECEIVED CLERK  
JAN 27 2005  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

PRIORITY DISPATCH CORPORATION fka )  
MEDICAL PRIORITY CONSULTANTS, )  
INC., a Utah corporation )  
)  
Plaintiff, )  
)  
vs. )  
)  
APCO INSTITUTE, INC., a Florida )  
corporation )  
)  
Defendant. )

ORDER  
TO EXTEND TIME  
TO ANSWER OR OTHERWISE  
RESPOND TO PLAINTIFF'S  
COMPLAINT

Case No. 2-04CV01127 BSJ  
Judge: Bruce S. Jenkins

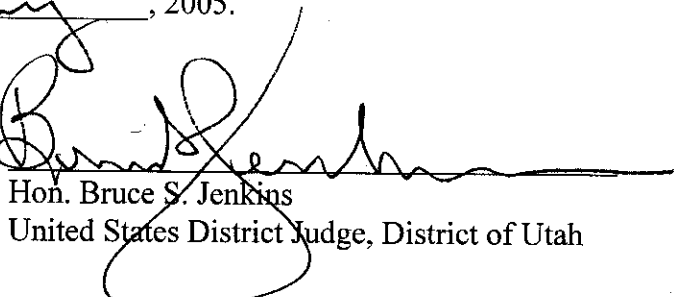
Based upon the stipulation of the parties which accompanies this Order, and pursuant to Local Rule DUCivR 77-2(a)(4), plaintiff, Priority Dispatch Corporation fka Medical Priority Consultants, Inc., and defendant, APCO Institute, Inc., through their respective counsel, stipulated and agreed to extend the time for defendant, APCO Institute, Inc., to answer or otherwise respond

6

to plaintiff's Complaint. Defendant, APCO Institute, Inc. shall have until Monday, February 7, 2005 to answer or otherwise respond to plaintiff's Complaint.

**IT IS HEREBY ORDERED** that defendant, APCO Institute, Inc. shall have until Monday, February 7, 2005, to answer or otherwise respond to plaintiff's Complaint.

DATED this 28 day of January, 2005.

  
Hon. Bruce S. Jenkins  
United States District Judge, District of Utah

Approved as to form:

STOEL RIVES

By:  1/22/05


David J. Jordan  
Michael A. Mangelson  
David L. Mortenson  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22 day of January, 2005, a true and correct copy of the foregoing ORDER TO EXTEND TIME TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFF'S COMPLAINT was mailed, first class mail, postage prepaid, to:

David J. Jordan, Esq.  
Michael A. Mangelson, Esq.  
David L. Mortenson, Esq.  
STOEL RIVES  
201 S. Main Street, Suite 1100  
Salt Lake City, UT 84111  
*Attorneys for Plaintiff*

Richard P. Sybert, Esq.  
Lindsay J. Hulley, Esq.  
GORDON & REES LLP  
101 West Broadway, Suite 1600  
San Diego, California 92101

  
\_\_\_\_\_



United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-01127

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

David J. Jordan, Esq.  
STOEL RIVES LLP  
201 S MAIN ST STE 1100  
SALT LAKE CITY, UT 84111-4904  
EMAIL

Mr. Robert L. Janicki, Esq.  
STRONG & HANNI  
3 TRIAD CTR STE 500  
SALT LAKE CITY, UT 84180  
EMAIL

Richard P. Sybert, Esq.  
GORDON & REES  
101 W BROADWAY STE 1600  
SAN DIEGO, CA 92101

Lindsay J. Hulley, Esq.  
GORDON & REES  
101 W BROADWAY STE 1600  
SAN DIEGO, CA 92101

Blake T. Ostler (4642)  
MACKEY PRICE THOMPSON & OSTLER  
57 West 200 South, Suite 350  
Salt Lake City, UT 84101  
Telephone: (801) 575-5000  
Facsimile No. (801) 575-5006  
Attorneys for Plaintiffs

**RECEIVED**

CLERK, U.S. DISTRICT COURT

JAN 23 2005 P 3:04

OFFICE OF U.S. DISTRICT JUDGE  
BRUCE S. JENKINS

**RECEIVED CLERK**

BY: DEPUTY CLERK JAN 27 2005

**U.S. DISTRICT COURT**

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION**

SUMMIT AIRPORT HOTEL, LLC, a Utah  
limited liability company; KINNON  
SANDLIN, an individual residing in Salt  
Lake County, Utah; THEODORE H. HEAP,  
an individual in Salt Lake County, Utah,  
APEX HOLDINGS, LLC, a Utah limited  
liability company; MGR INVESTMENT  
GROUP, LLC, a Utah limited liability  
company,

Plaintiffs,

vs.

SHERATON CORPORATION, a Delaware  
corporation,

Defendant.

**ORDER**

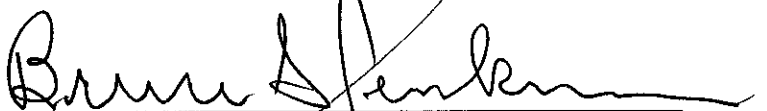
Civil No. 2:04-CV-00664

Judge Bruce S. Jenkins

Pursuant to Plaintiffs' Motion to Dismiss, the above-entitled matter is dismissed without  
prejudice.

DATED the 28 day of January, 2005.

**BY THE COURT:**



Bruce S. Jenkins  
U.S. District Court Judge

**ORIGINAL** 5

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00664

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Blake T. Ostler, Esq.  
MACKEY PRICE THOMPSON & OSTLER  
57 W 200 S STE 350  
SALT LAKE CITY, UT 84101-1655  
EMAIL

United States District Court  
District of Utah

Markus B. Zimmer  
Clerk of Court

Louise S. York  
Chief Deputy

January 31, 2005

Mr. Patrick Fisher, Clerk  
United States Court of Appeals  
for the Tenth Circuit  
1823 Stout Street  
Denver, CO 80257

RE: RECORD ON APPEAL  
USA v. Whitehead -- 04-4252  
Lower Docket: 1:03-CR-83-DAK

Dear Mr. Fisher:

We hand you herewith, by FedEx mail, Volumes I-III of the record on appeal in the above-referenced case.

Volume:	Contents:
I.	Consisting of designated documents 1, 27-28, 30-33, 35.
II.	Consisting of designated transcript for 10/06/04(Sentencing).
III.	Consisting of SEALED pre-sentence report.

Please acknowledge receipt of this record on appeal by signing the enclosed copy of this letter and returning it to my attention.

Sincerely,

Markus B. Zimmer, Clerk

By: /S  
Aaron Paskins  
Appeals Clerk

cc: Counsel of Record

FedEx Mail Receipt No.: 7928 3488 1966

**ACKNOWLEDGMENT OF RECEIPT:**

**Received by:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**41**

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:03-cr-00083

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

Julie George, Esq.  
PO BOX 112338  
29 S STATE STE 7  
SALT LAKE CITY, UT 84147  
EMAIL

David F. Backman, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 P 5:39

DISTRICT OF UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK RECEIVED CLERK

JAN 28 2005

U.S. DISTRICT COURT

SNELL & WILMER L.L.P.  
Alan L. Sullivan (3152)  
Todd M. Shaughnessy (6651)  
Amy F. Sorenson (8947)  
15 West South Temple, Suite 1200  
Salt Lake City, Utah 84101-1004  
Telephone: (801) 257-1900  
Facsimile: (801) 257-1800

CRAVATH, SWAINE & MOORE LLP  
Evan R. Chesler (admitted pro hac vice)  
David R. Marriott (7572)  
Worldwide Plaza  
825 Eighth Avenue  
New York, New York 10019  
Telephone: (212) 474-1000  
Facsimile: (212) 474-3700

*Attorneys for Defendant/Counterclaim-Plaintiff  
International Business Machines Corporation*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC.

Plaintiff/Counterclaim-Defendant,

v.

INTERNATIONAL BUSINESS MACHINES  
CORPORATION,

Defendant/Counterclaim-Plaintiff.

~~PROPOSED~~  
ORDER RE BRIEFING FOR PENDING  
MOTIONS

Civil No. 2:03CV0294 DAK

Honorable Dale A. Kimball

Magistrate Judge Brooke C. Wells

387

Based upon the stipulation of the parties, and good cause appearing,

IT IS HEREBY ORDERED as follows:

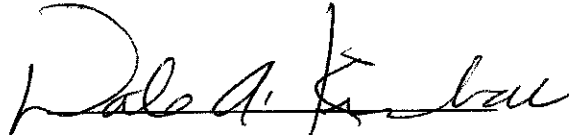
IBM's Memorandum in Opposition to SCO's Motion to Compel IBM to Produce Samuel Palmisano for Deposition shall be due on February 11, 2005;

SCO's Reply Memorandum in Support of its Renewed Motion to Compel Discovery shall be due on February 25, 2005; and

SCO's Reply Memorandum in Support of its Motion to Compel IBM to Produce Samuel Palmisano for Deposition shall be due on March 4, 2005.

DATED this 28<sup>th</sup> day of January, 2005.

**BY THE COURT**

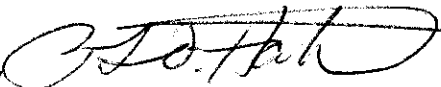


APPROVED AS TO FORM:

HATCH, JAMES & DODGE, P.C.

Brent O. Hatch

Mark F. James

By   
Counsel for Plaintiff

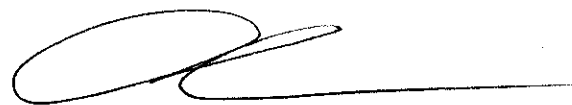
**CERTIFICATE OF SERVICE**

I hereby certify that on the 28<sup>th</sup> day of January, 2005, a true and correct copy of the foregoing was and was sent by U.S. Mail, postage prepaid, to the following:

Brent O. Hatch  
Mark F. James  
HATCH, JAMES & DODGE, P.C.  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101

Stephen N. Zack  
Mark J. Heise  
BOIES, SCHILLER & FLEXNER LLP  
100 Southeast Second Street, Suite 2800  
Miami, Florida 33131

Robert Silver  
Edward Normand  
Sean Eskovitz  
BOIES, SCHILLER & FLEXNER LLP  
333 Main Street  
Armonk, NY 10504

A handwritten signature in black ink, appearing to read 'Amy F. Sorenson', written over a horizontal line.

Amy F. Sorenson



United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cv-00294

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Brent O. Hatch, Esq.  
HATCH JAMES & DODGE  
10 W BROADWAY STE 400  
SALT LAKE CITY, UT 84101  
EMAIL

Scott E. Gant, Esq.  
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5301 WISCONSIN AVE NW  
WASHINGTON, DC 20015

Frederick S. Frei, Esq.  
ANDREWS KURTH  
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Evan R. Chesler, Esq.  
CRAVATH SWAINE & MOORE  
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Mark J. Heise, Esq.  
BOIES SCHILLER & FLEXNER  
100 SE 2ND ST STE 2800  
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1299 OCEAN AVE STE 900  
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Robert Silver, Esq.  
BOIES SCHILLER & FLEXNER  
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ARMONK, NY 10504

Stuart H. Singer, Esq.  
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401 E LAS OLAS BLVD STE 1200  
FT LAUDERDALE, FL 33301  
EMAIL

Mr. David W Scofield, Esq.  
PETERS SCOFIELD PRICE  
340 BROADWAY CENTRE  
111 E BROADWAY  
SALT LAKE CITY, UT 84111  
EMAIL

Mr. Michael P O'Brien, Esq.  
JONES WALDO HOLBROOK & MCDONOUGH  
170 S MAIN ST STE 1500  
PO BOX 45444  
SALT LAKE CITY, UT 84145-0444

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 P 5:39

PAUL M. WARNER, United States Attorney (#3639)  
JAN N. ALLRED, Assistant United States Attorney (#4741)  
Attorneys for the United States of America  
185 South State Street, Suite 400  
Salt Lake City, Utah 84111-1506  
Telephone (801) 524-5682

RECEIVED CLERK  
JAN 28 2005  
U.S. DISTRICT COURT

---

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

---

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	O R D E R
	)	
vs.	)	
	)	
MICHAEL F. BAWDEN,	)	Case No. 2:99CR00233-001
	)	
Defendant,	)	Honorable Dale A. Kimball

---

The Court, having received the Stipulation of the parties dated January 25, 2005, and good cause appearing therefor,  
IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment was entered on November 30, 1999 in the total sum of \$56,902.00 in favor of the United States of America (hereafter the "United States") and against Michael F. Bawden (hereafter "Bawden").

2. Bawden has agreed to pay and the United States has agreed to accept monthly installment payments from him in the amount of \$200.00 commencing on the 1<sup>st</sup> day of February, 2005 and

28

continuing thereafter on the 1<sup>st</sup> day of each month for a period of 12 months. At the end of said time period, and yearly thereafter, Bawden shall submit a current financial statement to the United States Attorney's Office. This payment schedule will be evaluated and may be modified, based on the documented financial status of Bawden.

3. In addition to the regular monthly payment set forth in paragraph 2, above, Bawden has agreed that the United States may submit his debt in the above-captioned case to the State of Utah and the U.S. Department of Treasury for inclusion in the State Finder program and the Treasury Offset program. Bawden understands that under these programs, any state or federal payment that he would normally receive may be offset and applied toward the debt in the above-captioned case.

4. Bawden shall submit all financial documentation in a timely manner and keep the United States Attorney's Office apprised of the following:


- a. Any change of address; and
- b. Any change in employment.

5. The United States has agreed to refrain from execution on the judgment so long as Bawden complies strictly with the agreement set forth in paragraphs 2 and 4, above. In the event Bawden fails to comply strictly with the terms set forth in the

Stipulation dated January 25, 2005, the United States may move the Court ex parte for a writ of execution and/or a writ of garnishment or any other appropriate order it deems necessary for the purpose of obtaining satisfaction of the judgment in full.

DATED this 25<sup>th</sup> day of January, 2005.

BY THE COURT:

  
DALE A. KIMBALL, Judge  
United States District Court

APPROVED AS TO FORM:

  
MICHAEL F. BAWDEN  
Defendant

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:99-cr-00233

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

Mr. Richard N Lambert, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Peter W Guyon  
614 NEWHOUSE BLDG  
10 EXCHANGE PLACE  
SALT LAKE CITY, UT 84111

FILED  
CLERK, U.S. DISTRICT COURT

United States District Court  
District of Utah

2005 JAN 28 P 5:39  
DISTRICT OF UTAH

UNITED STATES OF AMERICA

vs.

Gavino Nava Ramirez

(For Revocation of Probation or Supervised Release)  
(For Offenses Committed On or After November 1, 1987)

BY: DEPUTY CLERK

Case Number: 2:98-CR-00417-001 DAK

Plaintiff Attorney: Leshia Lee-Dixon, AUSA

Defendant Attorney: Carlos Garcia

Atty: CJA \_\_\_ Ret \_\_\_ FPD ☒

Defendant's Soc. Sec. No.: \_\_\_\_\_

Defendant's Date of Birth: \_\_\_\_\_

Defendant's USM No.: 07052-081

Defendant's Residence Address:

None legally

January 27, 2005

Date of Imposition of Sentence

Defendant's Mailing Address:

None

Country Mexico

Country Mexico

THE DEFENDANT:

☒ admitted to allegation(s)

1

☐ pleaded nolo contendere to allegation(s)  
which was accepted by the court.

☐ was found guilty as to allegation(s)

COP 01/27/05 Verdict \_\_\_\_\_

Violation Number

1

Nature of Violation

Illegal re-entry into the USA

Date Violation Occurred

Oct. 31, 2004

Entered on docket

1-31-05 by:

B. Kline  
Deputy Clerk

☐ The defendant has been found not guilty on count(s)

☐ Count(s) \_\_\_\_\_ (is)(are) dismissed on the motion of the United States.

SENTENCE

Pursuant to the Sentencing Reform Act of 1984, it is the judgment and order of the Court that the defendant be committed to the custody of the United States Bureau of Prisons for a term of **6 months, with credit for time served.**

Upon release from confinement, the defendant shall be placed on supervised release for a term of **36 months.**

☐ The defendant is placed on Probation for a period of \_\_\_\_\_  
The defendant shall not illegally possess a controlled substance.

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*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as directed by the probation officer.

- ☐ The above drug testing condition is suspended based on the court's determination that the defendant possesses a low risk of future substance abuse. (Check if applicable.)

### **SPECIAL CONDITIONS OF SUPERVISED RELEASE/PROBATION**

In addition to all Standard Conditions of (Supervised Release or Probation) set forth in PROBATION FORM 7A, the following Special Conditions are imposed: (see attachment if necessary)

1. The defendant shall not illegally re-enter the USA. If the defendant returns to the USA during the period of supervision, he is instructed to contact the U.S. Probation Office in the District of Utah within 72 hours of arrival in the USA.

### **CRIMINAL MONETARY PENALTIES**

#### **FINE**

The defendant shall pay a fine in the amount of \$ \_\_\_\_\_, payable as follows:

- ☐ forthwith.
- ☐ in accordance with the Bureau of Prison's Financial Responsibility Program while incarcerated and thereafter pursuant to a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☐ in accordance with a schedule established by the U.S. Probation office, based upon the defendant's ability to pay and with the approval of the court.
- ☒ other:  
**No Fine Imposed**

- ☐ The defendant shall pay interest on any fine more than \$2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f).
- ☐ The court determines that the defendant does not have the ability to pay interest and pursuant to 18 U.S.C. § 3612(f)(3), **it is ordered that:**
- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:
- \_\_\_\_\_



## RESTITUTION

The defendant shall make restitution to the following payees in the amounts listed below:

<u>Name and Address of Payee</u>	<u>Amount of Loss</u>	<u>Amount of Restitution Ordered</u>
----------------------------------	-----------------------	--

Totals: \$ \_\_\_\_\_ \$ \_\_\_\_\_

(See attachment if necessary.) All restitution payments must be made through the Clerk of Court, unless directed otherwise. If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless otherwise specified.

☐ Restitution is payable as follows:

☐ in accordance with a schedule established by the U.S. Probation Office, based upon the defendant's ability to pay and with the approval of the court.

☐ other: \_\_\_\_\_

☐ The defendant having been convicted of an offense described in 18 U.S.C. § 3663A(c) and committed on or after 04/25/1996, determination of mandatory restitution is continued until \_\_\_\_\_ pursuant to 18 U.S.C. § 3664(d)(5)(not to exceed 90 days after sentencing).

☐ An Amended Judgment in a Criminal Case will be entered after such determination

## SPECIAL ASSESSMENT

The defendant shall pay a special assessment in the amount of \$ \_\_\_\_\_, payable as follows:

☐ forthwith.

☐ \_\_\_\_\_

**IT IS ORDERED** that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid

## PRESENTENCE REPORT/OBJECTIONS

The court adopts the factual findings and guidelines application recommended in the presentence report except as otherwise stated in open court.

Defendant: Gavino Nava Ramirez  
Case Number: 2:98-CR-00417-001 DAK

Page 4 of 5

**RECOMMENDATION**

- ☐ Pursuant to 18 U.S.C. § 3621(b)(4), the Court makes the following recommendations to the Bureau of Prisons:
- 

**CUSTODY/SURRENDER**

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender to the United States Marshal for this district at \_\_\_\_\_ on \_\_\_\_\_.
- ☐ The defendant shall report to the institution designated by the Bureau of Prisons by \_\_\_\_\_ Institution's local time, on \_\_\_\_\_.

DATE:

January 28, 2005

Dale A. Kimball

United States District Judge

Defendant: Gavino Nava Ramirez  
Case Number: 2:98-CR-00417-001 DAK

Page 5 of 5

**RETURN**

I have executed this judgment as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_  
at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
UNITED STATES MARSHAL

By \_\_\_\_\_  
Deputy U.S. Marshal

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:98-cr-00417

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation  
DISTRICT OF UTAH  
,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
,  
EMAIL

Leshia M. Lee-Dixon, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Robert L. Booker, Esq.  
BOOKER & ASSOCIATES  
100 WATERMILL TRACE  
FRANKLIN, TN 37069-1840

Benjamin C. McMurray, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

Carlos A. Garcia, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

Mr. L. Clark Donaldson, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

Michael R. Sikora, Esq.  
SALT LAKE LEGAL DEFENDER ASSOCIATION

424 E 500 S STE 300  
SALT LAKE CITY, UT 84111  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 P 5:39

DISTRICT OF UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK

 **ORIGINAL**

Brent O. Hatch (5715)  
HATCH, JAMES & DODGE, PC  
10 West Broadway, Suite 400  
Salt Lake City, Utah 84101  
Telephone: (801) 363-6363  
Facsimile: (801) 363-6666

*Attorney for Plaintiff Case Data Corporation*

RECEIVED CLERK

JAN 27 2005

U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH**

CASE DATA CORPORATION, a Utah  
corporation

Plaintiff,

vs.

XEROX CORPORATION, a New York  
corporation,

Defendant.

~~Proposed~~ **ORDER GRANTING JOINT  
MOTION FOR DISMISSAL**

Civil No. 1:04cv00140

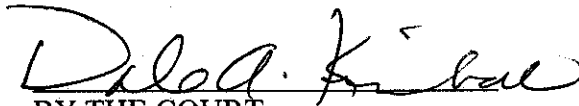
Honorable Dale A. Kimball

Having considered the parties' Stipulation and Joint Motion for Dismissal, and good cause shown, the Joint Motion is GRANTED, and

IT IS HEREBY ORDERED THAT:

The claims of all parties in this matter are dismissed with prejudice with each party bearing its own costs and attorneys' fees.

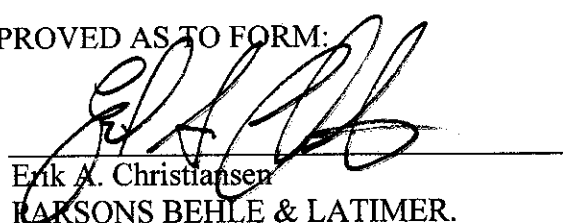
ORDERED this 28<sup>th</sup> day of January, 2005.

  
BY THE COURT

12

APPROVED AS TO FORM:

By:

  
Erik A. Christiansen  
PARSONS BEHLE & LATIMER.

*Counsel for Defendant*

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cv-00140

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Brent O. Hatch, Esq.  
HATCH JAMES & DODGE  
10 W BROADWAY STE 400  
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Erik A. Christiansen, Esq.  
PARSONS BEHLE & LATIMER  
201 S MAIN ST STE 1800  
PO BOX 45898  
SALT LAKE CITY, UT 84145-0898  
EMAIL



FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 10:23  
DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

*Proposed Order prepared by:*

Mona Lyman Burton (5399)  
James L. Barnett (7462)  
HOLLAND & HART LLP  
60 E. South Temple, Suite 2000  
Salt Lake City, Utah 84111-1031  
Telephone: (801) 595-7800  
Facsimile: (801) 364-9124

Attorneys for Equilon Enterprises LLC

RECEIVED CLERK

JAN 26 2005

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

EQUILON ENTERPRISES LLC D/B/A  
SHELL OIL PRODUCTS US;

Plaintiff,

vs.

NOEL COOK, an individual and RANAE  
COOK, an individual;

Defendants.

ORDER ADDRESSING FIVE  
PENDING MOTIONS

Civil No: 2:02cv01363 TS

Judge: Ted Stewart  
Magistrate David O. Nuffer

The Court, having considered the stipulated motion of the parties and being otherwise informed in the premises,

HEREBY FINDS OR ORDERS THAT:

1. The defendants' pending motion to extend discovery cut-off has been withdrawn without prejudice;
2. The defendants' pending motion to compel has been withdrawn without prejudice;

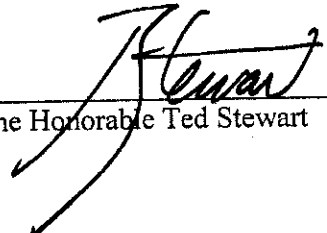
3. Plaintiff's pending motion to quash deposition and subpoena and for protective order has been withdrawn without prejudice;

4. Plaintiff shall file its reply memorandum supporting its pending motion for summary judgment on or before February 28, 2005; and

5. Plaintiff shall file its memorandum in opposition to the defendants' pending Rule 56(f) motion on or before February 28, 2005 and defendants shall file their reply in support of that motion on or before March 28, 2005.

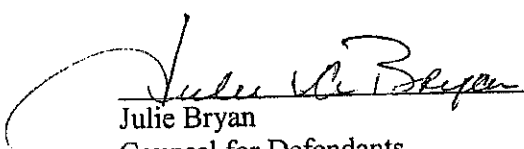
So ordered this 28<sup>th</sup> day of January, 2005

UNITED STATES DISTRICT COURT

  
The Honorable Ted Stewart

Approved as to form and content:

COHNE, RAPPAPORT & SEGAL, P.C.

  
Julie Bryan  
Counsel for Defendants

**CERTIFICATE OF SERVICE**

I certify that on the 26<sup>th</sup> of January, 2005, I served a copy of the foregoing document to the following by:

☒  
☐  
☐

U.S. Mail, postage prepaid  
Hand Delivery  
Fax

Julie A. Bryan  
Edward T. Vasquez  
COHNE, RAPPAPORT & SEGAL, P.C.  
525 East First South, Fifth Floor  
P. O. Box 11008  
Salt Lake City, UT 84147-0008

Gandy Halos

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-01363

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Ms. Julie A. Bryan, Esq.  
COHNE RAPPAPORT & SEGAL  
PO BOX 11008  
SALT LAKE CITY, UT 84147-0008  
EMAIL

Ms Mona Lyman Burton, Esq.  
HOLLAND & HART  
60 E SOUTH TEMPLE STE 2000  
SALT LAKE CITY, UT 84111-1031  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 10:23  
DISTRICT OF UTAH  
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BY: \_\_\_\_\_  
JAN 26 2005  
U.S. DISTRICT COURT

Glenn R. Bronson (7362)  
Wilford A. Beesley III (8724)  
**PRINCE, YEATES & GELDZAHLER**  
175 East 400 South, Suite 900  
Salt Lake City, Utah 84111  
(801) 524-1000

Attorneys for Plaintiff DIRECTV, Inc.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH**

DIRECTV, INC.,

Plaintiff,

vs.

SCOTT,

Defendant.

**DEFAULT JUDGMENT AGAINST  
DEFENDANT BRYAN SCOTT**

Civil No. 2:04cv00823 TS

Pursuant to Fed.R.Civ.P. 55(b)(1), the Default Certificate entered against Defendant Bryan Scott on December 1, 2004, and Plaintiff's Motion for Entry of Default Judgment Against Defendant Bryan Scott and the accompanying Memorandum filed therewith, and good cause appearing,

11

JUDGMENT IS HEREBY ENTERED against Defendant Bryan Scott and in favor of Plaintiff in the amount of \$30,000.00.

DATED this 28<sup>th</sup> day of January, 2005.

BY THE COURT:

Entered on docket  
1/28/05 by:  
[Signature]  
Deputy Clerk

[Signature]  
Ted Stewart  
United States District Court Judge

#### CLERK'S CERTIFICATE OF SERVICE

I hereby certify that, on the \_\_\_\_\_ day of January, 2005, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **DEFAULT JUDGMENT AGAINST DEFENDANT BRYAN SCOTT** to the following:

Bryan Scott  
638 Pheasant Haven Ct  
Draper, Utah 84020

G:\WAB\CLIENTS\DirectTV\Scott 14251-67.1\p-default judgment Scott.doc

jmr

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00823

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

Glenn R. Bronson, Esq.  
PRINCE YEATES & GELDZAHLER  
175 E 400 S STE 900  
SALT LAKE CITY, UT 84111  
EMAIL

Bryan Scott  
638 PHEASANT HAVEN CT  
DRAPER, UT 84020

BRIAN M. BARNARD USB # 0215  
JAMES L. HARRIS, Jr. USB # 8204  
UTAH LEGAL CLINIC  
Attorneys for Plaintiff  
214 East Fifth South Street  
Salt Lake City, Utah 84111-3204  
Telephone: (801) 328-9531  
Facsimile: (801) 328-9533  
ulcr2d2c3po@utahlegalclinic.com

FILED  
CLERK, U.S. DISTRICT COURT  
RECEIVED CLERK  
JAN 26 2005  
JAN 31 A 10:23  
DISTRICT OF UTAH  
U.S. DISTRICT COURT  
BY: \_\_\_\_\_  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
NORTHERN DIVISION

-----  
B.L. BRERETON, :  
Plaintiff, : ORDER ON  
vs. : SETTLEMENT STIPULATION  
SYRACUSE CITY CORP., et al., : Civil No. 1:04-CV-145 TS  
Defendants. : Judge Ted Stewart  
-----

BASED UPON THE WRITTEN STIPULATION of Plaintiff, B.L. Brereton, by and through counsel, and the Defendants, Syracuse City Corp., et al, by and through counsel, in full settlement of this matter and for good cause appearing,

IT IS HEREBY ORDERED:

1. Defendants shall repeal the current Syracuse City Code, Section 11-14-8 (A)&(C) within sixty (60) days of the signing of

8



the parties' settlement agreement. Until such time as repealed, defendants shall not enforce those portions of the ordinance and shall not pursue any pending cases for violations of those sections.

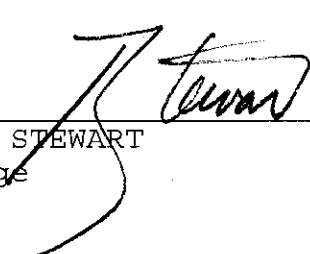
2. Defendants may in the future enact ordinance(s) covering the same or similar subject matter as Syracuse City Code, Section 11-14-8 (A)&(C), taking into consideration the speech protections of the Utah Constitution and the United States Constitution, and the issues raised by plaintiff in this action.

3. In lieu of any claim for damages, attorney fees or court costs, defendants have paid to and for the use and benefit of plaintiff's counsel the sum of one thousand five hundred dollars (\$1,500.00).

4. All claims in this action are dismissed with prejudice.

DATED this 28<sup>th</sup> day of January 2005.

BY THE COURT:

  
\_\_\_\_\_  
TED STEWART  
Judge

CERTIFICATE OF MAILING

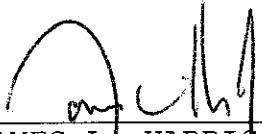
I hereby certify that I caused to be mailed a true and correct copy of the foregoing ORDER ON SETTLEMENT STIPULATION to:

David L. Church  
BLAISDELL & CHURCH  
Attorney for Defendants  
5995 South Redwood Road  
Salt Lake City, Utah 84123

on the 26<sup>th</sup> day of JANUARY, 2005, postage prepaid in the United States Postal Service.

UTAH LEGAL CLINIC  
Attorneys for PLAINTIFF

by:

  
\_\_\_\_\_  
JAMES L. HARRIS, JR.  
BRIAN M. BARNARD

jmr

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cv-00145

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Brian M. Barnard, Esq.  
UTAH LEGAL CLINIC  
214 E 500 S  
SALT LAKE CITY, UT 84111-3204  
EMAIL

Mr. David L. Church, Esq.  
BLAISDELL & CHURCH  
5995 S REDWOOD RD  
SALT LAKE CITY, UT 84123  
EMAIL

PAUL M. WARNER, United States Attorney (#2889)  
JAN N. ALLRED, Assistant United States Attorney (#4741)  
Attorneys for the United States of America  
185 South State Street, Suite 400  
Salt Lake City, Utah 84111-1506  
Telephone (801) 524-5682

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 28 A 10:59  
RECEIVED CLERK  
JAN 25 2005

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	ORDER REGARDING WRIT OF
	)	GARNISHMENT AND FINAL ORDER
Plaintiff,	)	IN GARNISHMENT
	)	
vs.	)	
	)	Case No. 2:00CV00761G
HAROLD L. NEWMAN,	)	
	)	
Defendant,	)	
	)	
UTAH STATE VETERAN'S NURSING	)	
HOME,	)	
	)	
Garnishee.	)	Honorable J. Thomas Greene

The Court, having received the Stipulation of the parties  
dated January 24, 2005, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Judgment was entered in the total sum of \$13,182.27  
in favor of the United States of America (hereafter the "United  
States") and against Harold L. Newman (hereafter "Newman").

2. A Writ of Garnishment was entered by the Clerk of the  
Court on January 5, 2005 based upon Application by the United  
States.

29

3. On January 13, 2005, the Writ was served on the Utah State Veteran's Nursing Home, Garnishee (hereafter the "Garnishee") and Newman on January 12, 2005.

4. Newman has waived his right to request a hearing of the garnishment pursuant to 28 U.S.C. § 3001, et. Seq., waived his right to raise objections regarding payment by the garnishee, and waived his right to an accounting from the United States according to 28 U.S.C. § 3205(c)(9)(B).

5. In lieu of the garnishment, Newman has agreed to pay through payroll deductions from his wages in the sum of \$50.00 per pay period to the United States commencing with the beginning of the next pay period ending January 15, 2005, and continuing thereafter each pay period for twelve months. At the end of the twelve month period, and yearly thereafter, Newman shall submit a current financial statement to the United States Attorney's Office. This payment schedule will be evaluated and may be modified, based on the documented financial status of Newman.

6. Newman shall submit all financial documentation in a timely manner and keep the United States Attorney's Office apprised of the following:

- a. Any change of address; and
- b. Any change in employment.

7. Newman has agreed that a Final Order in Garnishment

be issued.

IT IS HEREBY ORDERED that beginning with the pay period ending January 15, 2005 and each pay period thereafter, the garnishee shall remit \$50.00, which is the payroll deduction amount.

IT IS FURTHER ORDERED that upon receipt of a letter from the United States to reinstate the garnishment or if Newman attempts to stop or decrease the payroll deductions of \$50.00, the Garnishee is ordered to commence withholding 25% of Newman's net wages payable to the United States until the judgment is paid in full.

8. The United States has agreed to refrain from execution on the judgment so long as Newman complies strictly with the agreement set forth in paragraphs 5 and 6 above. In the event Newman fails to comply strictly with the terms set forth in the Stipulation dated January 24, 2005, the United States may reinstate the garnishment by letter to the garnishee.

DATED this 26<sup>th</sup> day of January, 2005.

BY THE COURT:

J. Thomas Greene  
J. Thomas Greene, Senior Judge  
United States District Court

APPROVED AS TO FORM:

HAROLD L. NEWMAN - Defendant

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:00-cv-00761

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

Harold L. Newman  
1447 S 200 E  
SALT LAKE CITY, UT 84115

Ms. Jan N. Allred, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 9:17  
DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

**IN THE UNITED STATES DISTRICT COURT**  
**DISTRICT OF UTAH, CENTRAL DIVISION**

Civil No. 2:02-cv-00270  
Judge Dee Benson  
Magistrate Judge Alba

432



IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff Franklin Covey Client Sales, Inc. ("Franklin Covey") is hereby awarded judgment against and shall recover from Defendant World Marketing Alliance, Inc. the sum of \$1,070,000.00, together with prejudgment interest in the amount of \$256,681.99 through November 1, 2004 and with prejudgment interest continuing to accrue from November 1, 2004 until the entry of this Judgment at a per diem rate of \$293.15.


It is further ORDERED, ADJUDGED AND DECREED that Franklin Covey's claims against Defendant World Financial Group, Inc. ("WFG") are dismissed with prejudice.

It is further ORDERED, ADJUDGED AND DECREED that WMA is hereby awarded judgment against and shall recover from WFG in the sum of \$112,535.00.

IT IS SO ORDERED.

DATED this 28<sup>th</sup> January, 2005  
~~day of November, 2004.~~

BY THE COURT:

  
HONORABLE DEE BENSON  
UNITED STATES DISTRICT COURT

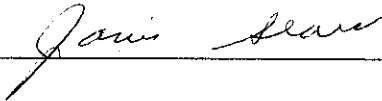
## CERTIFICATE OF SERVICE

On the date below written, the undersigned hereby certifies that a true and correct copy of the foregoing proposed **JUDGMENT** was served, via hand delivery, to the following:

Sean N. Egan  
136 South Main, Suite 408  
Salt Lake City, UT 84101

R. Willis Orton  
Jason W. Beutler  
KIRTON & McCONKIE  
60 East South Temple, #1800  
Salt Lake City, Utah 84111

DATED this the 4<sup>th</sup> day of November, 2004.

  
\_\_\_\_\_

P:\JSears\JanS\Clients\Franklin Covey\WMA\Pleadings\Judgment.wpd

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-00270

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

David E. Spalten, Esq.  
MERRITT & TENNEY LLP  
200 GLLERIA PARKWAY STE 500  
ATLANTA, GA 30339-3151

R. Willis Orton, Esq.  
KIRTON & MCCONKIE  
60 E S TEMPLE STE 1800  
SALT LAKE CITY, UT 84111-1004  
EMAIL

Sean N. Egan, Esq.  
136 S MAIN STE 408  
KEARNS BLDG  
SALT LAKE CITY, UT 84101-3636  
EMAIL

Mr. Richard D Burbidge, Esq.  
BURBIDGE & MITCHELL  
215 S ST ST STE 920  
SALT LAKE CITY, UT 84111  
EMAIL

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH – NORTHERN DIVISION

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 9:17

BILLY JOE BEAVER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

**ORDER**

Case No. 1:04-CV-00178 DB  
(Criminal Case No. 1:03-CR-80 DKW)

Judge Dee Benson

On December 12, 2003, petitioner Billy Joe Beaver pleaded guilty to two counts of possession of a controlled substance with intent to distribute. Following petitioner's plea, the Court sentenced petitioner to 130 months of imprisonment. On December 23, 2004, petitioner filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The government asserts that petitioner's motion is untimely and should therefore be dismissed.

Motions brought under 28 U.S.C. § 2255 are governed by a one-year statute of limitations. For petitioner's motion, the limitation period began to run on the date on which his judgment of conviction became final. See 28 U.S.C. § 2255(1). Following the reasoning of Clay v. United States, 537 U.S. 522 (2003), the Court takes into account the time petitioner had to appeal his sentence in determining the date on which his judgment became final. Petitioner had ten business days after his sentencing to file an appeal. See Fed. R. App. P. 4(b)(1)(A); Fed. R. App. P. 26(a)(2). Taking into account these ten business days, petitioner's motion complies with the statute of limitations and is therefore timely. The government requested leave to file a substantive response to petitioner's motion in the event that the Court accepted the motion as

2

timely. Accordingly, the Court hereby ORDERS the government to respond to petitioner's motion within forty-five days of the date of this order.

IT IS SO ORDERED

DATED this 27 day of January, 2005.

A handwritten signature in black ink that reads "Dee Benson". The signature is written in a cursive, flowing style.

---

Dee Benson  
United States District Judge

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cv-00178

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Billy Joe Beaver  
FEDERAL CORRECTIONAL INSTITUTE  
10738-081  
PO BOX 1000  
LORETTO, PA 15940

Colleen K. Coebergh, Esq.  
DRUG ENFORCEMENT ADMINISTRATION  
METROPOLITAN NARCOTICS TASK FORCE  
348 E SOUTH TEMPLE  
SALT LAKE CITY, UT 84111  
EMAIL

FILED  
CLERK U.S. DISTRICT COURT  
2005 JAN 31 A 9:18  
DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH - CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH MICHAEL LEIN,

Defendant.

BY: \_\_\_\_\_  
DEPUTY CLERK

**ORDER ADOPTING REPORT  
AND RECOMMENDATION**

Case No. 2:03-CR-0083 DB

Judge Dee Benson

Before the Court is the Report and Recommendation of magistrate judge Samuel Alba, issued December 15, 2004. At issue is Defendant's motion to suppress evidence obtained on two occasions: 1) drugs recovered by law enforcement officers executing a knock and announce search warrant at Defendant's home, and 2) statements made by Defendant during postindictment questioning. The magistrate judge recommended the motion be denied, and neither party has filed an objection to the Report and Recommendation.

Having reviewed all relevant materials, including the reasoning set forth in the report, the Court agrees with the magistrate judge. Accordingly, the Court ADOPTS the Report and Recommendation in its entirety, including the findings of fact and legal analysis given by the magistrate judge in the Report and Recommendation. IT IS SO ORDERED.

DATED this 26<sup>th</sup> day of January, 2005.

  
Dee Benson  
United States District Judge

80

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cr-00083

True and correct copies of the attached were either mailed, faxed or e-mailed  
by the clerk to the following:

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

Robert Breeze, Esq.  
402 E 900 S #1  
SALT LAKE CITY, UT 84111  
EMAIL

Jonathan D. Yeates, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL



STEVEN B. KILLPACK, Federal Defender (#1808)  
HENRI SISNEROS, Assistant Federal Defender (#6653)  
Utah Federal Defender Office  
46 West 300 South, Suite 110  
Salt Lake City, Utah 84101  
Telephone: (801) 524-4010

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 9:18  
DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

BARBARA CLOWARD,

Defendant.

ORDER TO CONTINUE  
JURY TRIAL

Case No. 2:04CR00613DB

Based upon the motion of the Defendant, BARBARA CLOWARD, through her attorney of record, HENRI SISNEROS, the Court hereby continues the trial date currently set for February 7, 2005, in the above-entitled matter to this 7<sup>th</sup> day of March, 2005, at 8:30 a.m.

Pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 (h)(8)(A), the Court finds that the ends of justice served by a continuance in this case outweighs the interests of the public and the Defendant in a speedy trial.

Dated this 31 day of January, 2005.

BY THE COURT:

Dee Benson

DEE BENSON

United States District Court Judge

13

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00613

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Richard W. Daynes, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Henri R. Sisneros, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

STEVEN B. KILLPACK, Federal Defender (#1808)  
L. CLARK DONALDSON, Assistant Federal Defender (#4822)  
UTAH FEDERAL DEFENDER OFFICE  
Attorneys for Defendant  
46 West Broadway, Suite 110  
Salt Lake City, Utah 84101  
Telephone: (801) 524-4010  
Telefax: (801) 524-4060

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 A 10:58

DISTRICT OF UTAH

RECEIVED CLERK Y:  
DEPUTY CLERK

JAN 26 2005

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRADLEY BEN ZOBELL,

Defendant.

ORDER TO CONTINUE  
DEPOSITION HEARING  
AND TRIAL

Case No. 2:03CR-760 DB

Based on the motion to continue deposition hearing and trial filed by defendant in the above-entitled case, and good cause appearing,

It is hereby ORDERED that the deposition hearing and trial previously scheduled for January 31, 2005, is hereby continued to this 28 day of February, 2005, at 2:00 pm COT

~~a.n.~~ Pursuant to 18 U.S.C. § 3161(h), the Court finds the ends of justice served by such a continuance outweigh the best interests of the public and the defendant in a speedy trial.


Accordingly, the time between the date of this order and the new trial date above is excluded

57

from speedy trial computation.

Dated this 31 day of January, 2005.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE DEE BENSON  
United States District Court Judge

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cr-00760

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert A. Lund, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Mr. L. Clark Donaldson, Esq.  
UTAH FEDERAL DEFENDER OFFICE  
46 W BROADWAY STE 110  
SALT LAKE CITY, UT 84101  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

United States District Court  
for the District of Utah

FILED  
CLERK, U.S. DISTRICT COURT

Petition and Order for Action on Conditions of Pretrial Release

Name of Defendant: David Desvari

Docket Number: 2:04-CR-00592 DAK

Name of Judicial Officer: Honorable David Nuffer

2005 JAN 31 A 9:57  
DISTRICT OF UTAH  
BY: \_\_\_\_\_  
DEPUTY CLERK

Date of Release: September 9, 2004

PETITIONING THE COURT

[ X ] To issue a warrant 12260 S. 700 W. Draper, Utah 84020

CAUSE

The pretrial services officer believes that the defendant has violated the conditions of supervision as follows:

**Allegation No. One:** On January 26 & 28, 2005 the defendant failed to submit to drug testing as directed by pretrial services.

**Allegation No. Two:** On January 20, 2005 the defendant admitted recent use of methamphetamine after submitting to an on site drug test.


I declare under penalty of perjury that the foregoing is true and correct

  
Steve Mockli, U.S. Pretrial Services Officer

Date: January 31, 2005

THE COURT ORDERS:

- [ ☒ ] The issuance of a Warrant  
[ ☐ ] No action  
[ ☐ ] Other

  
David Nuffer  
United States Magistrate Judge

Date: 1/31/05

31

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00592

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Lana Taylor, Esq.  
SALT LAKE COUNTY DISTRICT ATTORNEY'S OFFICE  
2001 S STATE STE S3600  
SALT LAKE CITY, UT 84190-1200  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
,  
EMAIL

US Probation  
DISTRICT OF UTAH  
,  
EMAIL

United States District Court  
for the District of Utah

Petition and Order for Warrant for Offender Under Supervision

Name of Offender: **Brian K. Nash**

Docket Number: **2:02-CR-00743-DB**

Name of Sentencing Judicial Officer: **Honorable Dee V. Benson**

Date of Original Sentence: **April 8, 2003**

Original Offense: **Unlawful User of Controlled Substance in Possession of a Firearm**

Original Sentence: **18 Months BOP Custody/36 Months Supervised Release**

Type of Supervision: **Supervised Release**

Supervision Began: **February 2, 2004**

PETITIONING THE COURT

☒ To issue a warrant to be placed as a detainer  
and toll the supervision term

In custody: Salt Lake County Adult Detention  
Center

CAUSE

The probation officer believes that the offender has violated the conditions of supervision as follows:

**Allegation No. 1:** On October 31, 2004, the defendant threatened to cause bodily injury to both his mother and his father-in-law.

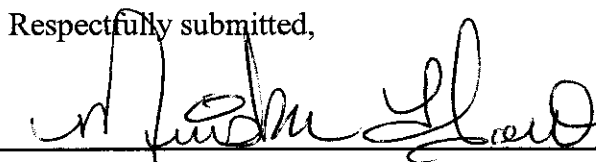
**Allegation No. 2:** The defendant admitted to having used methamphetamine during the month of October, 2004.

**Allegation No. 3:** The defendant failed to submit to drug testing on October 19, October 30, and November 1, 2004.

**Allegation No. 4:** On November 9, 2004, the defendant provided false personal information to a police officer, fled from a police officer, interfered with a legal arrest, and assaulted a police officer.

Respectfully submitted,

by



Meriska Holt, U.S. Probation Officer

Date: January 26, 2005

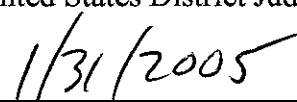
THE COURT ORDERS:

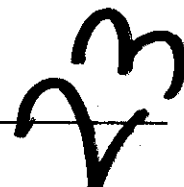
- ☒ The issuance of a warrant to be placed as a  
detainer and tolling of the supervision term
- ☐ No action
- ☐ Other



Honorable Dee V. Benson  
Chief United States District Judge

Date:







United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cr-00723

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

US Probation  
DISTRICT OF UTAH

'  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

'  
EMAIL

Mr. Mark K Vincent, Esq.  
US ATTORNEY'S OFFICE

'  
EMAIL

ROBERT W. HUGHES #1573  
Attorney for Defendants  
111 East 300 South, Suite 370  
Salt Lake City, Utah 84111  
Telephone: (801) 364-9075  
Fax: (801) 364-9081

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 P 1:49  
RECEIVED CLERK  
DISTRICT OF UTAH  
2005 JAN 28 P 5:14  
BY: \_\_\_\_\_  
DEPUTY CLERK  
U.S. DISTRICT COURT  
DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH, CENTRAL DIVISION

OSVALDO TRIPODI,  Plaintiff,  vs.  MICROCULTURE, INC. and MacCLAREN GIBLETTE,  Defendants.	<b>ORDER EXTENDING TIME TO FILE REPLY</b>  Case No. 2:04CV00194 TS  Judge Ted Stewart
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Based upon Defendants' Motion for Extension of Time and Stipulation Extending Time to File Reply, the Court having reviewed the file, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendants shall have an additional ten (10) days in which to file their Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment in the above-entitled action. Defendants' Reply shall be filed with the Court on or before February 10, 2005.

DATED this 31<sup>st</sup> day of January, 2005.

BY THE COURT:

  
\_\_\_\_\_  
HONORABLE TED STEWART  
U.S. District Court Judge

42

APPROVED AS TO FORM:

**ROBERT H. WILDE**  
Attorney for Plaintiff

## CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Order Extending Time to File Reply to Robert H. Wilde, 935 East South Union Avenue #D-102, Midvale, Utah 84047, postage prepaid, this 28 day of January, 2005.

Jeri Crook

jmr

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-00194

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert H. Wilde, Esq.  
ROBERT H. WILDE PC  
935 E S UNION AVE #D-102  
MIDVALE, UT 84047  
JFAX 9,5665202

Mr. Robert W Hughes, Esq.  
111 E 300 S STE 370  
SALT LAKE CITY, UT 84111  
EMAIL

Ellen Maycock  
KRUSE LANDA MAYCOCK & RICKS  
50 W BROADWAY STE 800  
PO BOX 45561  
SALT LAKE CITY, UT 84145-0561

Having considered the parties' Stipulation and Joint Motion for Extension, and good

cause shown, the Joint Motion is GRANTED, and

IT IS HEREBY ORDERED THAT:

Plaintiffs be granted until February 15, 2005 to file any motions for class certification.

ORDERED this 31<sup>st</sup> day of January, 2005.

  
\_\_\_\_\_  
BY THE COURT

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-00950

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Robert L. Browning, Esq.  
SCOPELITIS GARVIN LIGHT & HANSON  
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INDIANAPOLIS, IN 46204-2965  
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Daniel R. Barney, Esq.  
SCOPELITIS GARVIN LIGHT & HANSON  
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Mr. Nelson L Hayes, Esq.  
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Paul D. Cullen Sr, Esq.  
THE CULLEN LAW FIRM PLLC  
1101 30TH ST NW STE 300  
WASHINGTON, DC 20007

Joyce E. Mayers, Esq.  
THE CULLEN LAW FIRM PLLC  
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WASHINGTON, DC 20007

Brent O. Hatch, Esq.  
HATCH JAMES & DODGE  
10 W BROADWAY STE 400  
SALT LAKE CITY, UT 84101

EMAIL

JEREMY M. DELICINO - 9959  
Attorney for Defendant  
10 West Broadway, Suite 650  
Salt Lake City, UT 84101  
Telephone: (801)364-6474  
Facsimile: (801) 364-5014

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 A 11:17  
DISTRICT OF UTAH  
BY:   
DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

v.

MAURO RUBEN BARRIGA,

Defendant.

:

:

:

:

:

ORDER REGARDING  
PSYCHOLOGICAL  
EXAMINATION

Case No. 1:04-CR-138 TC

Judge Dee Benson

---

Based on the motion of the defendant and good cause appearing,

It is hereby ORDERED that Dr. Steven Szykula, Ph.D, a clinical psychologist, is authorized  
to meet with the defendant, on a contact basis, at the Cache County Jail for the purpose of  
completing a psychological examination of the defendant.

DATED this 31 day of January, 2005.

BY THE COURT:

  
TENA CAMPBELL  
U.S. District Court Judge

18



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 31st  
day of January, 2005, to:

Kevin Sundwall  
Assistant United States Attorney  
185 South State Street, Suite 400  
Salt Lake City, Utah 84111

Kevin Leavitt

alt

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cr-00138

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Kevin L. Sundwall, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Jeremy M. Delicino, Esq.  
MCCAUGHEY & METOS  
10 W BROADWAY STE 650  
SALT LAKE CITY, UT 84101

EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH	
CENTRAL DIVISION	<b>FILED</b>
	CLERK, U.S. DISTRICT COURT
	January 31, 2005 (11:24am)
	DISTRICT OF UTAH
UNITED STATES OF AMERICA,  Plaintiff,	<b>MEMORANDUM OPINION AND ORDER FINDING THE GUIDELINES ARE ADVISORY UNDER THE “SAFETY VALVE” PROVISION</b>
vs.	
SALVADOR DURAN, aka SALVADOR DURAN LOPEZ,  Defendant.	
	Case No. 2:04-CR-00396 PGC

Defendant Salvador Duran stands before the court for sentencing. He previously pled guilty to possession with the intent to distribute more than 50 grams of actual methamphetamine – an offense carrying a ten-year mandatory minimum prison sentence. Mr. Duran, however, qualifies for the “safety valve” provision,<sup>1</sup> which allows the court to impose a sentence below the mandatory minimum. The safety valve provision further directs the court to impose any lower sentence “pursuant to” the Guidelines.

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<sup>1</sup> See 18 U.S.C. § 3553(f); U.S.S.G. § 5C1.2.

The government argues that even though the Guidelines have been generally rendered advisory under *United States v. Booker*,<sup>2</sup> the Guidelines nonetheless remain mandatory when the court proceeds under the safety valve. This argument is unpersuasive. *Booker* held that the judicial fact finding inherent in mandatory Guidelines violated the defendant's Sixth Amendment right to a jury trial. That constitutional defect also exists when a court uses the Guidelines to determine a safety valve sentence. Accordingly, to avoid a constitutional defect in the safety valve provision, the Guidelines must be deemed as advisory when the court proceeds under this provision. Therefore, the court will sentence defendant Duran under an advisory Guidelines system.

### **The Safety Valve Provision**

The safety valve provision – 18 U.S.C. § 3553(f) – allows a court to impose a sentence below any mandatory minimum for a drug offense if five criteria are satisfied: (1) the defendant is a first-time offender, (2) he did not use violence or firearms, (3) the offense did not result in serious injury to anyone, (4) the defendant was not an organizer, leader, manager, or supervisor in the offense, and (5) the defendant has given the government all the information that he has regarding the offense. Under the safety valve provision, if the defendant satisfies the five criteria listed above, the court is then directed to impose a Guideline sentence. The statute states, if the safety valve is met, “the court *shall* impose a sentence *pursuant to* the guidelines promulgated by the United States Sentencing Commission . . . without regard to any statutory minimum sentence . . . .”<sup>3</sup> This statute might be read

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<sup>2</sup> 125 S.Ct. 738 (Jan. 12, 2005).

<sup>3</sup> 18 U.S.C. § 3553(f) (emphases added).

as requiring the court to impose a Guideline sentence.<sup>4</sup> Indeed, in this case the government argues that the court *must* follow the Guidelines and impose a sentence no lower than the Guideline sentence. Because both sides agree that the applicable Guideline range in this case is 87-108 months,<sup>5</sup> the government contends that the court lacks any discretion to impose anything less than an 87-month sentence.

### **The “Advisory” Nature of the Guidelines After *Booker***

The government’s position is creative and skillfully argued. It founders, however, on the fact that the Guidelines themselves are now advisory. In *United States v. Booker*, the Supreme Court found certain provisions of the Sentencing Guidelines unconstitutional.<sup>6</sup> Specifically, *Booker* held that the Guidelines violated the defendant’s Sixth Amendment right to a jury trial by requiring a judge to find facts that resulted in a legally-required lengthier sentence for the defendant.<sup>7</sup> *Booker* then turned to the issue of the remedy for this constitutional defect. In the remedial portion of its opinion, the Court held that by severing the two provisions in the Act that make the Guidelines mandatory, the rest of the sentencing scheme could be preserved.<sup>8</sup> The Court explained that severing

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<sup>4</sup> See *United States v. Roman-Zarate*, 115 F.3d 778, 784 (10th Cir. 1997) (“Title 18 U.S.C. 3553(f) requires the district court to sentence a defendant according to the sentencing guidelines, rather than imposing the statutory mandatory minimum sentence . . .”).

<sup>5</sup> See Pre-Sentence Report, ¶ 48, Offense Range of 29, Criminal History of 1.

<sup>6</sup> See *Booker*, 125 S. Ct. at 754.

<sup>7</sup> See *id.* at 756.

<sup>8</sup> See *id.*

these provisions “makes the Guidelines effectively advisory,”<sup>9</sup> thereby eliminating the constitutional problem stemming from the legally binding nature of the judicially-determined facts. The upshot of these holdings, as this court recently explained in *United States v. Wilson*, is that district courts should give “considerable weight” to the Guidelines “in determining what sentence to impose,” but are not required to follow the Guidelines.<sup>10</sup>

The advisory Guidelines are not transformed into mandatory Guidelines under the safety valve provision. To the contrary, that provision itself directs the court to impose a sentence “pursuant to” the Guidelines. So long as the court consults the Guidelines in determining an appropriate sentence, any resulting sentence is “pursuant to” the Guidelines. Such a sentence would be “in compliance with” or “authorized by” the Guidelines, as *Black’s Law Dictionary* defines “pursuant to.”<sup>11</sup>

Any other reading of the safety valve provision would render it unconstitutional under the Sixth Amendment as interpreted in *Booker*. *Booker* emphasized that the Sixth Amendment jury trial guarantee forbids judicial fact-finding of facts that could increase a defendant’s sentence. The Court explained, “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>12</sup> At the same time,

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<sup>9</sup> *Id.*

<sup>10</sup> *United States v. Wilson*, 2005 WL 78552, at \*1 (Jan. 13, 2005).

<sup>11</sup> BLACK’S LAW DICTIONARY 1250 (7th ed. 1999).

<sup>12</sup> *Booker*, 125 S.Ct. 738, \*756.

however, in the remedial section of the opinion, *Booker* explains that the Federal Sentencing Act, as modified by *Booker*, now requires a sentencing court to consider Guidelines ranges because “[w]ithout the ‘mandatory’ provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.”<sup>13</sup>

If the government’s argument in this case is correct, then the court must engage in judicial fact-finding that could increase the sentence that the court is legally required to impose. That, of course, is the very thing that *Booker* forbids. Rather than read the safety valve provision as containing this constitutional defect, it is far better to read the provision as simply incorporating advisory Guidelines. As *Booker* itself explains, while Congress preferred a mandatory system, “that mandatory system is no longer an open choice.”<sup>14</sup> As a result, it is appropriate to follow the conventional rule of statutory construction to avoid reading the statute as being constitutionally deficient.<sup>15</sup>

In the future, Congress could, of course, choose to modify the safety valve statute so that qualifying defendants simply dropped from one mandatory minimum sentence to another lower mandatory sentence. For example, Congress could provide that anyone subject to a ten-year mandatory minimum who meets the safety valve criteria would then be subject to, say, a five-year mandatory minimum. But that is not the way the statute is currently drafted. If *Booker* means anything, it is that Congress is not free to say, in effect, that anyone subject to a ten-year mandatory

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<sup>13</sup> *Id.* at 764.

<sup>14</sup> *Id.* at 767.

<sup>15</sup> See, e.g., *Clark v. Suarez Martinez*, 2005 WL 50099 (Jan. 12, 2005).

minimum who meets the criteria must then face unconstitutional judicial fact-finding in the determination of the final sentence. In other words, the safety valve provision does not work some kind of Sixth Amendment alchemy and transform unconstitutionally binding guidelines into constitutionally binding guidelines.

For all these reasons, the court concludes that once the safety valve provision is satisfied, the court must look to the advisory Guidelines in determining the appropriate sentence. The court, however, retains discretion to ultimately determine the appropriate punishment. Of course, in exercising its discretion, “the court will give heavy weight to the Guidelines in determining an appropriate sentence.”<sup>16</sup> But the Guidelines – which are advisory in all other settings – are advisory in the safety valve setting as well.

### **Application to this Case**

Having resolved *Booker*’s effect on the safety valve provision, the court is now in a position to determine defendant Duran’s sentence. The facts are as follows: On May 5, 2004, Duran approached a confidential informant and handed him a bag containing two ounces of methamphetamine and two ounces of cocaine. Duran requested that the informant keep the drugs until Duran could deliver it to another individual later that day. Police maintained contact with the informant as he accompanied Duran to several locations to deliver drugs. At one point, the informant was taken to Duran’s house, where he was introduced to some individuals, including Francisco and Ruben Vasquez. Ruben Vasquez offered to pay the informant to accompany Francisco Vasquez to Las Vegas, Nevada, for the purpose of picking up a large quantity of controlled

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<sup>16</sup>*Wilson*, 2005 WL 78552, at \*1.



substances. The informant agreed and accompanied Francisco Vasquez to Las Vegas. Ruben Vasquez and his wife also went to Las Vegas, but drove in separate cars. While returning home, with drugs in hand, Ruben Vasquez and his wife were stopped by the Nevada Highway Patrol and taken into custody. Francisco and the informant were later arrested in Utah County. Continuing its investigation, law enforcement agents executed a search warrant of Duran's home, in which the agents discovered one ounce of cocaine. Duran was arrested.

In his presentence interview, Duran accepted responsibility for the crime by admitting to participating in drug distribution with the Vasquez brothers for purposes of obtaining drugs for his own use. Furthermore, Duran is a first-time offender. The appropriate Guidelines range therefore starts from a base level offense for conspiracy to possess the relevant quantity of cocaine of 34, decreased by three levels for acceptance of responsibility. Duran also meets the safety valve criteria – which decreased Duran's total offense level an additional two levels to 29.<sup>17</sup> A base offense level of 29 and a criminal history of one, results in a guideline range of 87-108 months. While this sentence is below the ten-year (120 month) mandatory minimum, the safety valve provision permits the court to impose this lower sentence. Both the government and Duran agree that this is the proper Guideline calculation.

Duran argues for a sentence even lower than 87 months, citing his lack of criminal record and his remorsefulness for his crime. These facts, however, are already fully reflected in the advisory Guideline sentence. As explained in *Wilson*, "In the exercise of its discretion, the court will only

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<sup>17</sup> U.S.S.G. § 5C1.2

depart from those Guidelines in unusual cases for clearly identified and persuasive reasons.”<sup>18</sup> The defendant has not provided any good reason for believing that the Guidelines sentence is inappropriate in this case. Accordingly, the court – in exercising its discretion – will follow the advice of the Guidelines and impose an 87-month sentence

### **Judgment Held Open**

At oral argument on this matter, the government requested time to consult with the Justice Department officials in Washington, D.C., to coordinate its position on this safety valve issue. Accordingly, the court will hold the judgment in this matter open for an additional 14 days from the date of this order to allow the government to file any objection to the court’s statutory analysis. Indeed, the court would appreciate the U.S. Attorney’s Office seeking to consult with its colleagues in Washington to determine what the Justice Department’s position is on the question discussed here. Otherwise, the U.S. Attorney’s Office in Utah might inadvertently take a different position from their colleagues elsewhere in the country. Inconsistent positions on such an important issue as applying the safety valve run the risk of creating differing sentences around the country. While *Booker* renders the Guidelines advisory, the court is still obligated to consider “the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct . . . .”<sup>19</sup> As *Wilson* explains, “the only way of avoiding gross disparities in sentencing from judge-to-judge and district-to-district is for sentencing courts to apply some uniform

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<sup>18</sup> *Wilson*, 2005 WL 78552, at \*1.

<sup>19</sup> 18 U.S.C. § 3553(a)(6).

measure in all cases.”<sup>20</sup> The Justice Department has an important role to play in insuring uniformity. The court would appreciate understanding how the Department intends to approach this issue in other cases before entering final judgment in this matter.

### **CONCLUSION**

The court holds that the safety valve provision, 18 U.S.C. § 3553(f), once satisfied, incorporates advisory Guidelines that gives the court discretion to impose any appropriate punishment. In exercising that discretion, the court will give “heavy weight” to the advisory Guideline sentence. In this case, the court imposes an 87-month sentence, the recommended Guideline sentence.

DATED this 30<sup>th</sup> day of January, 2005.

BY THE COURT:

/S/  
\_\_\_\_\_  
Paul G. Cassell  
United States District Judge

---

<sup>20</sup> *Wilson*, 2005 WL 78552, at \* 11.

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00396

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Veda M. Travis, Esq.  
US ATTORNEY'S OFFICE  
/  
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Frank E. Di Giacomo, Esq.  
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Mr. Earl G Xaiz, Esq.  
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175 E 400 S STE 400  
SALT LAKE CITY, UT 84111  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

/  
EMAIL

US Probation  
DISTRICT OF UTAH

/  
EMAIL

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JAN 26 2005

BROOKE C. WELLS  
U.S. MAGISTRATE

RECEIVED CLERK

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 31 P 2:27

2005 JAN 24 P 6:20

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

United States of America

Plaintiff

v.

DYEE LENEIA DYSART

Defendant.

CASE NO.

Appearing on behalf of:

DEPENDANT

(Plaintiff/Defendant)

## MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Jerry Mooney, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: Jan., 2005

(Signature of Local Counsel)

(Utah Bar Number)

## APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Frank H. Williams Jr., hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i)     a non-resident of the State of Utah or, (ii)     a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Jerry Mooney as associate local counsel.

Date: January 21, 2005Check here X if petitioner is lead counsel.

Frank H. Williams Jr.  
(Signature of Petitioner)

FEE PAID

Name of Petitioner: Frank H. Williams Jr. Office Telephone: 3103496672  
(Area Code and Main Office Number)

Business Address: LAW OFFICES OF FRANK H. WILLIAMS JR.  
(Firm/Business Name)  
965 N. Vignes St #11 Los Angeles CA 90012  
Street City State Zip

**BAR ADMISSION HISTORY**

COURTS TO WHICH ADMITTED	LOCATION	DATE OF ADMISSION
--------------------------	----------	-------------------

United States District Court	CA Central District	1/99
------------------------------	---------------------	------

State of California Courts	Statewide	1/98
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(If additional space is needed, attach separate sheet.)

**PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT**

CASE TITLE	CASE NUMBER	DATE OF ADMISSION
------------	-------------	-------------------

N/A		
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(If additional space is needed, attach a separate sheet.)

**ORDER OF ADMISSION**

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 31<sup>st</sup> day of January, 2005.

  
\_\_\_\_\_  
U.S. District Judge

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**  
**OFFICE OF THE CLERK OF COURT**  
Suite 150, Frank E. Moss United States Courthouse  
350 South Main Street  
Salt Lake City, Utah 84101-2180  
(801) 524-6100

**PRO HAC VICE ADMISSION APPLICATION**

**INSTRUCTIONS**

**Admission Fee:** \$15.00 payable by check or money order to Clerk, U.S. District Court. Fee will cover membership for the duration of the case or twelve (12) months, whichever is longer. Pro hac applicants who paid the fee within the past 12 months and who are requesting admission to practice in a case other than that originally specified when the fee was paid should check the blank below and indicate the date of their most recent pro hac vice admission to this Court. *Applicants are required to complete and submit this form for each case in which they participate as pro hac vice counsel.*

N/A Applicant was previously admitted pro hac vice to this Court in case # \_\_\_\_\_; month of most recent pro hac vice admission and payment of fee was \_\_\_\_\_, 20\_\_\_\_.

**Application:** Please type or print legibly and complete all blanks.

**Designated Local Counsel:** Must be an active member in good standing of the Utah State Bar and the Bar of this Court.

**Mandatory Requirements:**

1. Provide and attach a separate list by number and title of all cases filed in this Court in which applicant has appeared as counsel in the past five years.
2. Type local counsel's name below the signature line and enter the bar number in the space provided.
3. If more than one attorney from the same firm is seeking pro hac admission in this case, please indicate which attorney will serve as lead counsel for purposes of receiving official court notices and other case-related documents.

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:05-cr-00052

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Richard W. Daynes, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

Mr. Jerome H Mooney, Esq.  
MOONEY LAW FIRM  
50 W BROADWAY STE 100  
SALT LAKE CITY, UT 84101  
EMAIL

Frank H. Williams, Esq.  
965 N VIGNES ST #11  
LOS ANGELES, CA 90012

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL



STEVEN B. KILLPACK, Federal Defender (#1808)  
WENDY M. LEWIS, Assistant Federal Defender (#5993)  
Utah Federal Defender Office  
46 West 300 South, Suite 110  
Salt Lake City, Utah 84101  
Telephone: (801) 524-4010

FILED  
U.S. DISTRICT COURT  
JAN 31 P 2:30  
DEPUTY CLERK

RECEIVED CLERK

JAN 26 2005

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

JAMES DELOST TRINNAMAN,

Defendant.

:

:

:

:

:

ORDER TO AMEND JUDGEMENT  
AND COMMITMENT

Case No. 2:04CR-185DKW

Based on motion of the defendant and good cause shown:

It is hereby ORDERED that the judgement and commitment in the above-entitled case reflect that the defendant's federal sentence run concurrent with his state sentence.

DATED this 31 day of January, 2005.

BY THE COURT:

*David K. Winder*

HONORABLE DAVID K. WINDER  
Senior United States District Court Judge

28

jmr

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00185

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Michele M. Christiansen, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

Wendy M. Lewis, FPD

FILED  
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CLERK, U.S. DISTRICT COURT

2005 JAN 31 JAN 28 2005

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ALTIRIS, INC., a Delaware corporation

Plaintiff

v.

SYMANTEC CORPORATION

Defendant.

CASE NO. 2:99CV 0013K

Appearing on behalf of:

Defendant

(Plaintiff/Defendant)

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Mark F. James, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: Jan. 28, 2005 Mark F. James 5295  
(Signature of Local Counsel) (Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Maren J. Clouse, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i)     a non-resident of the State of Utah or, (ii)     a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Mark James as associate local counsel.

Date: January 20, 2005

Check here     if petitioner is lead counsel.

Maren J. Clouse  
(Signature of Petitioner)

FEE PAID

Name of Petitioner: Maren J. Clouse Office Telephone: 650-833-7316  
(Area Code and Main Office Number)

Business Address: Heller Ehrman White & McAuliffe LLP  
(Firm/Business Name)  
275 Middlefield Road, Menlo Park, CA 94025  
Street City State Zip

150

**BAR ADMISSION HISTORY**

**COURTS TO WHICH ADMITTED**

**LOCATION**

**DATE OF ADMISSION**

California State Bar

December 4, 2003

U.S. District Court for the  
Northern District of California

December 4, 2003

(If additional space is needed, attach separate sheet.)

**PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT**

**CASE TITLE**

**CASE NUMBER**

**DATE OF ADMISSION**

N/A

(If additional space is needed, attach a separate sheet.)

**ORDER OF ADMISSION**

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 31<sup>st</sup> day of January, 2005.

  
\_\_\_\_\_  
U.S. District Judge

## CERTIFICATE OF SERVICE

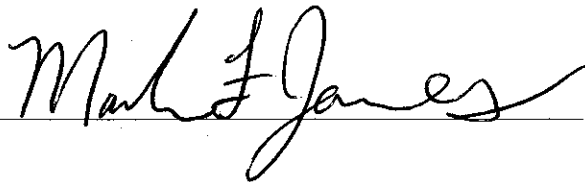
I hereby certify that I caused a true and correct copy of the foregoing to be mailed by  
U.S. Mail, first class postage prepaid, this 28th day of January, 2005, to the following:

C. Kevin Spears  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, Utah 84145-0898

Kevin Meek  
Baker Botts  
201 Ross Avenue  
Dallas, Texas 75201-2980

L. Gene Spears  
Baker Botts  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002

Robert Haslam  
Heller Ehrman White & Mcauliffe  
275 Middlefield Road  
Menlo Park, California 94025



Mark F. Jones

FILED  
CLERK, U.S. DISTRICT COURT  
RECEIVED CLERK  
2005 JAN 31 P 12:02  
JAN 28 2005

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ALTIRIS, INC., a Delaware corporation

Plaintiff

v.

SYMANTEC CORPORATION

Defendant.

CASE NO. 2:99CV 0013K

Appearing on behalf of:  
Defendant

(Plaintiff/Defendant)

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Mark F. James, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: Jan. 28, 2005

(Signature of Local Counsel)

5295  
(Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, James R. Knox, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i) ☒ a non-resident of the State of Utah or, (ii) ☐ a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Mark James as associate local counsel.

Date: January 20, 2005

Check here ☐ if petitioner is lead counsel.

(Signature of Petitioner)

FEE PAID

Name of Petitioner: James R. Knox

Office Telephone: 650-324-7022

(Area Code and Main Office Number)

Business Address:

Heller Ehrman White & McAuliffe LLP

(Firm/Business Name)  
2775 Sand Hill Road, Menlo Park, CA 94025

Street

City

State

Zip

BAR ADMISSION HISTORY

COURTS TO WHICH ADMITTED

LOCATION

DATE OF ADMISSION

U.S. District Court for the Northern District of  
California

March 13, 1998

United States District Court, District of Columbia

October 7, 1996

United States Court of Appeals for the Fifth Circuit

(If additional space is needed, attach separate sheet.)

PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

CASE TITLE

CASE NUMBER

DATE OF ADMISSION

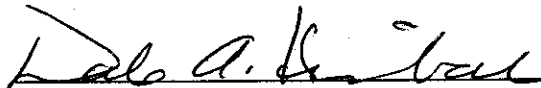
N/A

(If additional space is needed, attach a separate sheet.)

ORDER OF ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 31<sup>st</sup> day of January, 2005.



U.S. District Judge

## CERTIFICATE OF SERVICE

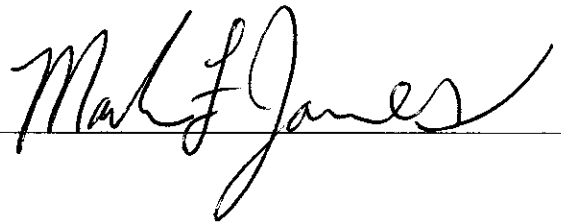
I hereby certify that I caused a true and correct copy of the foregoing to be mailed by  
U.S. Mail, first class postage prepaid, this 28th day of January, 2005, to the following:

C. Kevin Spears  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, Utah 84145-0898

Kevin Meek  
Baker Botts  
201 Ross Avenue  
Dallas, Texas 75201-2980

L. Gene Spears  
Baker Botts  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002

Robert Haslam  
Heller Ehrman White & Mcauliffe  
275 Middlefield Road  
Menlo Park, California 94025

A handwritten signature in cursive script, reading "Mark F. James", is written over a horizontal line.



FILED  
CLERK, U.S. DISTRICT COURT  
RECEIVED CLERK  
2005 JAN 31 P 12:02  
JAN 28 2005  
U.S. DISTRICT COURT  
DEPUTY CLERK

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ALTIRIS, INC., a Delaware corporation

Plaintiff

v.

SYMANTEC CORPORATION

Defendant.

CASE NO. 2:99CV 0013K

Appearing on behalf of:  
Defendant

(Plaintiff/Defendant)

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Mark F. James, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: Jan. 28, 2005

(Signature of Local Counsel)

5295  
(Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Charles W. Burk, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i)     a non-resident of the State of Utah or, (ii)     a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Mark James as associate local counsel.

Date:                     , 2005

Check here     if petitioner is lead counsel.

(Signature of Petitioner)

FEE PAID

Name of Petitioner: Charles W. Burk Office Telephone: 650-324-6705  
(Area Code and Main Office Number)

Business Address: Heller Ehrman White & McAuliffe LLP  
(Firm/Business Name)  
275 Middlefield Road, Menlo Park, CA 94025  
Street City State Zip

### BAR ADMISSION HISTORY

#### COURTS TO WHICH ADMITTED

#### LOCATION

#### DATE OF ADMISSION

U.S. District Court for the Eastern District of  
California

January 22, 2004

U.S. District Court for the Northern District of  
California

February 9, 2004

(If additional space is needed, attach separate sheet.)

### PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

#### CASE TITLE

#### CASE NUMBER

#### DATE OF ADMISSION

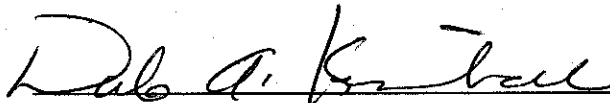
N/A

(If additional space is needed, attach a separate sheet.)

### ORDER OF ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 31<sup>st</sup> day of January, 2005.

  
U.S. District Judge

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed by  
U.S. Mail, first class postage prepaid, this 28th day of January, 2005, to the following:

C. Kevin Spears  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, Utah 84145-0898

Kevin Meek  
Baker Botts  
201 Ross Avenue  
Dallas, Texas 75201-2980

L. Gene Spears  
Baker Botts  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002

Robert Haslam  
Heller Ehrman White & Mcauliffe  
275 Middlefield Road  
Menlo Park, California 94025

A handwritten signature in cursive script, reading "Mark L. James", is written over a horizontal line.

FILED RECEIVED CLERK  
CLERK, U.S. DISTRICT COURT

2005 JAN 31 P 12:02 JAN 28 2005

DISTRICT OF UTAH U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

DEPUTY CLERK

ALTIRIS, INC., a Delaware corporation

Plaintiff

v.

SYMANTEC CORPORATION

Defendant.

CASE NO. 2:99CV 0013K

Appearing on behalf of:

Defendant

(Plaintiff/Defendant)

MOTION AND CONSENT OF DESIGNATED ASSOCIATE LOCAL COUNSEL

I, Mark F. James, hereby move the pro hac vice admission of petitioner to practice in this Court. I hereby agree to serve as designated local counsel for the subject case; to readily communicate with opposing counsel and the Court regarding the conduct of this case; and to accept papers when served and recognize my responsibility and full authority to act for and on behalf of the client in all case-related proceedings, including hearings, pretrial conferences, and trials, should Petitioner fail to respond to any Court order.

Date: Jan 28, 2005

Mark F. James  
(Signature of Local Counsel)

5295  
(Utah Bar Number)

APPLICATION FOR ADMISSION PRO HAC VICE

Petitioner, Daniel N. Kassabian, hereby requests permission to appear pro hac vice in the subject case. Petitioner states under penalty of perjury that he/she is a member in good standing of the bar of the highest court of a state or the District of Columbia; is (i)     a non-resident of the State of Utah or, (ii)     a new resident who has applied for admission to the Utah State Bar and will take the bar examination at the next scheduled date; and, under DUCivR 83-1.1(d), has associated local counsel in this case. Petitioner's address, office telephone, the courts to which admitted, and the respective dates of admission are provided as required.

Petitioner designates Mark James as associate local counsel.

Date: January 25, 2005

Check here     if petitioner is lead counsel.

D. Kassabian  
(Signature of Petitioner)

FEE PAID

Name of Petitioner: Daniel N. Kassabian Office Telephone: 415-772-6000  
(Area Code and Main Office Number)

Business Address: Heller Ehrman White & McAuliffe LLP  
(Firm/Business Name)  
333 Bush Street, San Francisco, CA 94104

Street

City

State

Zip

### BAR ADMISSION HISTORY

COURTS TO WHICH ADMITTED	LOCATION	DATE OF ADMISSION
U.S. District Court for the Northern District of California		January 7, 2002
U.S. District Court for the Eastern District of California		January 7, 2002
U.S. District Court for the Central District of California		January 7, 2002
U.S. District Court for the Southern District of California		January 7, 2002
Ninth Circuit Court of Appeals		January 7, 2002
Federal Circuit Court of Appeals		May 14, 2003
California State Bar		December 3, 2001

(If additional space is needed, attach separate sheet.)

### PRIOR PRO HAC VICE ADMISSIONS IN THIS DISTRICT

CASE TITLE	CASE NUMBER	DATE OF ADMISSION
N/A		

(If additional space is needed, attach a separate sheet.)

### ORDER OF ADMISSION

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of DUCiv R 83-1.1(d), the motion for Petitioner's admission pro hac vice in the United States District Court, District of Utah in the subject case is GRANTED.

This 31<sup>st</sup> day of January, 2005.

  
U.S. District Judge

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be mailed by  
U.S. Mail, first class postage prepaid, this 28th day of January, 2005, to the following:

C. Kevin Spears  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
P.O. Box 45898  
Salt Lake City, Utah 84145-0898

Kevin Meek  
Baker Botts  
201 Ross Avenue  
Dallas, Texas 75201-2980

L. Gene Spears  
Baker Botts  
One Shell Plaza  
910 Louisiana  
Houston, Texas 77002

Robert Haslam  
Heller Ehrman White & Mcauliffe  
275 Middlefield Road  
Menlo Park, California 94025

A handwritten signature in cursive script, reading "Mark F. Jones", is written over a horizontal line.

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:99-cv-00013

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Mark F James, Esq.  
HATCH JAMES & DODGE  
10 W BROADWAY STE 400  
SALT LAKE CITY, UT 84101  
EMAIL

Robert Haslam, Esq.  
HELLER EHRMAN WHITE & MCAULIFFE  
275 MIDDLEFIELD RD  
MENLO PARK, CA 94025

Lillian C. Henry, Esq.  
HELLER EHRMAN WHITE & MCAULIFFE  
333 BUSH ST STE 3100  
SAN FRANCISCO, CA 94104

Catherine Agnoli, Esq.  
PARSONS BEHLE & LATIMER  
201 S MAIN ST STE 1800  
PO BOX 45898  
SALT LAKE CITY, UT 84145-0898  
EMAIL

Mr. C. Kevin Speirs, Esq.  
PARSONS BEHLE & LATIMER  
201 S MAIN ST STE 1800  
PO BOX 45898  
SALT LAKE CITY, UT 84145-0898  
EMAIL

Kevin Meek, Esq.  
BAKER BOTTS LLP  
2001 ROSS AVE  
DALLAS, TX 75201-2980

L. Gene Spears, Esq.  
BAKER BOTTS LLP  
ONE SHELL PLAZA  
910 LOUISIANA  
HOUSTON, TX 77002

Scott F. Partridge, Esq.  
BAKER BOTTS LLP  
ONE SHELL PLAZA  
910 LOUISIANA  
HOUSTON, TX 77002  
EMAIL



JAN 31 2005

MARKUS B. ZIMMER, Clerk

By \_\_\_\_\_  
DEPUTY CLERK

LOREN E. WEISS [USB No. 3969]  
Van Cott, Bagley, Cornwall & McCarthy  
50 South Main Street, Suite 1600  
P.O. Box 45340  
Salt Lake City, Utah 84145-0340  
Telephone: 801-532-3333  
Facsimile: 801-534-0058  
Attorneys for Defendant David R. Nemelka

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-VS-

DAVID R. NEMELKA, DAVID N. NEMELKA,  
HENRY SCHWARTZ and KURTIS D.  
HUGHES,

**Defendants.**

**ORDER TO RELEASE UNITED STATES  
PASSPORT TO  
DAVID R. NEMELKA**

Case No. 2:02CR0027PGC  
Judge: John Edwards Conway

Based upon motion of the Defendant, stipulation by the United States Government, and the final resolution of the above-referenced matter, IT IS HEREBY ORDERED: that the Clerk of the United States District Court is to release David R. Nemelka's passport to him.

DATED this 25<sup>th</sup> day of January, 2005.

BY THE COURT:

John E. Conway  
United States District Court Judge

112

CERTIFICATE OF SERVICE

I hereby certify that on the 19<sup>th</sup> day of January, 2005, I caused a true and correct copy of the herein document to be served by mail to the following persons, at the following addresses:

Stewart C. Walz  
Richard N. Lambert  
Robert A. Lund  
Office of the United States Attorney  
185 South State Street, Suite 400  
Salt Lake City, Utah 84111

Brent O. Hatch  
Hatch James & Dodge  
10 West Broadway, #400  
Salt Lake City, UT 84101

Roman E. Darmer, II  
Howrey Simon Arnold & White  
2020 Main Street, Suite 1000  
Irvine, California 92614

Stephanie Ames  
32 Exchange Place, #101  
Salt Lake City, UT 84111

  
\_\_\_\_\_

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cr-00027

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Judge John E. Conway  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO  
#740  
333 LOMAS BLVD NW  
ALBUQUERQUE, NM 87102  
EMAIL

US Probation  
DISTRICT OF UTAH  
,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH  
,  
EMAIL

Mr. Stewart C. Walz, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Mr. Richard N Lambert, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Robert A. Lund, Esq.  
US ATTORNEY'S OFFICE  
,  
EMAIL

Loren E. Weiss, Esq.  
VAN COTT, BAGLEY, CORNWALL & MCCARTHY  
50 South Main St, Suite 1600  
P.O. Box 45340  
Salt Lake City, Utah 84145-0340

Edwin S. Wall, A7446  
WALL LAW OFFICES  
8 East Broadway, Ste. 500  
Salt Lake City, Utah 84111  
Telephone: (801) 523-3445  
Facsimile: (801) 746-5613  
Electronic Notice: wallsec@xmission.com

FILED  
CLERK, U.S. DISTRICT COURT

2005 JAN 28 A 10:32

DISTRICT OF UTAH

BY: \_\_\_\_\_  
DEPUTY CLERK

RECEIVED  
JAN 25 2005  
JUDGE'S COPY

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA;

Plaintiff,

v.

ROBERT J. TREAT,

Defendant.

**ORDER**

Case No. 1:04 CR 0001-001 - DN

Hon. David O. Nuffer  
United States Magistrate Judge

**MOTION TO EXTEND DATE OF SURRENDER**

COMES NOW the defendant, by and through his attorney, Edwin S. Wall, and moves the court to extend the defendant's date of surrender for two weeks. Grounds for this motion are:

The Bureau of Prisons has not yet made a designation of a federal detention facility. Mr. Treat's surrender date set in the Judgment is January 28, 2005. An extension of time would facilitate the Bureau of Prisons in making a designation. The prosecuting attorney has been advised of this motion and indicates she has no objection to the extension.

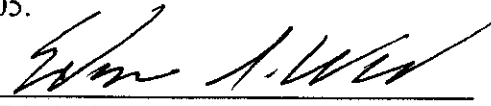
WHEREFORE it is respectfully requested that the court extend the date of surrender in the above-entitled matter to noon, February 11, 2005.

DATED this 25<sup>th</sup> day of January, 2005.

**SO ORDERED**

  
DAVID NUFFER  
U.S. Magistrate Judge

Date 1/26/05

  
Edwin S. Wall,  
Attorney for the Defendant

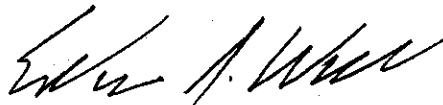
48

# CERTIFICATE OF SERVICE

I hereby certify that on the 25<sup>th</sup> day of JANUARY, 2005, a true and correct copy of the foregoing document was served by depositing the same in the United State Mail, first class postage prepaid, addressed as follows:

Elizabethann Stevens, AUSA  
United States Attorneys Office  
185 South State Street, Ste. 400  
Salt Lake City, Utah 84111

Lorrie A. Ryther  
United States Probation Office  
341 South Main Street, Room 204  
Salt Lake City, Utah 84111



Lynn Nicholas Echum Wall

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 1:04-cr-00001

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Elizabethanne C Stevens, Esq.  
US ATTORNEY'S OFFICE

,  
EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL

Edwin S. Wall, Esq.  
WALL LAW OFFICES  
8 East Broadway, Suite 500  
Salt Lake City, Utah 84111

Larry R. Laycock (USB No. 4868)  
Sterling A. Brennan (USB No. 10060)  
Janna L. Jensen (USB No. 9677)  
WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 533-9800  
Facsimile: (801) 328-1707

Attorneys for Plaintiffs  
LEHI ROLLER MILLS CO., INC. and LEHI MILL, L.L.C.

UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

LEHI ROLLER MILLS CO., INC., and LEHI  
MILL, L.L.C.,

Plaintiffs,

v.

MILLCREEK HARVEST, INC., a Utah  
corporation; AXIS CORPORATION, a Utah  
corporation; JEFFREY PRICE, an individual,  
JEREMY WILLEY, an individual; KIRK  
WILLEY, an individual, and DOE  
DEFENDANTS 1-10, inclusive,

Defendants.

Case No. 2:04 CV 1039ST

~~PROPOSED~~ ORDER APPROVING OF  
PARTIES' STIPULATION RE ENTRY OF  
PERMANENT INJUNCTION AGAINST  
DEFENDANTS

JUDGE: HON. TED STEWART

MAGISTRATE JUDGE: HON. SAMUEL ALBA

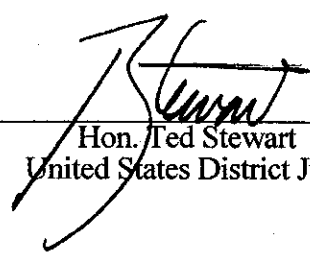
WHEREAS, defendants Millcreek Harvest, Inc., The Axis Corporation, Jeffrey D. Price, Jeremy D. Willey, and Kirk B. Willey (collectively, "Defendants") in the above-captioned action (the "Action") having entered into that certain "Stipulation Re Entry Of Permanent Injunction Against Defendants," and good cause appearing for the approval of such Stipulation and the entry of an Order thereon,

44

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

The Stipulation is APPROVED by the Court in its entirety, such that Defendants, and each of them, as well as any and all persons or entities in active concert or participation with any of the Defendants, are permanently enjoined, barred, and prohibited from making, selling, offering for sale, or distributing any goods, products, or services that in any way impair, infringe, or violate any intellectual property rights of either or both of the Plaintiffs or their successors or assigns, including, but not limited to, any of Plaintiffs' trade dress, trade name, or trademark rights

DATED: 1/27/05

  
\_\_\_\_\_  
Hon. Ted Stewart  
United States District Judge

Approved as to Form:

WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION

By \_\_\_\_\_  
Sterling A. Brennan  
Attorneys for Plaintiffs

STOEL RIVES LLP

By \_\_\_\_\_  
Kenneth B. Black  
Attorneys for Defendants



United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-01039

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Mr. Larry R Laycock, Esq.  
WORKMAN NYDEGGER  
1000 EAGLE GATE TOWER  
60 E S TEMPLE  
SALT LAKE CITY, UT 84111  
EMAIL

Kenneth B. Black, Esq.  
STOEL RIVES LLP  
201 S MAIN ST STE 1100  
SALT LAKE CITY, UT 84111-4904  
EMAIL

Steven T. Lovett, Esq.  
STOEL RIVES BOLEY JONES & GREY  
900 SW 5th AVE #2600  
PORTLAND, OR 97204-1268  
EMAIL

Larry R. Laycock (USB No. 4868)  
Sterling A. Brennan (USB No. 10060)  
Janna L. Jensen (USB No. 9677)  
WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION  
1000 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111  
Telephone: (801) 533-9800  
Facsimile: (801) 328-1707

Attorneys for Plaintiffs  
LEHI ROLLER MILLS CO., INC. and LEHI MILL, L.L.C.

UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

LEHI ROLLER MILLS CO., INC., and LEHI  
MILL, L.L.C.,

Plaintiffs,

v.

MILLCREEK HARVEST, INC., a Utah  
corporation; AXIS CORPORATION, a Utah  
corporation; JEFFREY PRICE, an individual,  
JEREMY WILLEY, an individual; KIRK  
WILLEY, an individual, and DOE  
DEFENDANTS 1-10, inclusive,

Defendants.

Case No. 2:04 CV 1039ST

~~PROPOSED~~ ORDER APPROVING OF  
PARTIES' STIPULATION RE: (1)  
DISMISSAL OF ACTION WITH  
PREJUDICE; AND (2) COURT'S  
RETENTION OF JURISDICTION TO  
ENFORCE STIPULATED PERMANENT  
INJUNCTION AND SETTLEMENT  
BETWEEN THE PARTIES

JUDGE: HON. TED STEWART

MAGISTRATE JUDGE: HON. SAMUEL ALBA

WHEREAS, the parties to the above-captioned action (the "Action") having entered into a settlement of all claims and disputes in the Action, which such settlement is set forth in that certain "Settlement and Mutual Release Agreement" effective January 26, 2005 (the "Agreement");

FILED  
CLERK, U.S. DISTRICT COURT  
2005 JAN 31 P 3:22  
DEPT. OF UTAH  
BY:  
DEPUTY CLERK

45

WHEREAS, the Agreement provides for, among other things, the entry of a permanent injunction (the "Injunction") in favor of plaintiffs Lehi Roller Mills Co., Inc. and Lehi Mill, L.L.C. (collectively, "Plaintiffs") and against defendants Millcreek Harvest, Inc., The Axis Corporation, Jeffrey D. Price, Jeremy D. Willey, and Kirk B. Willey (collectively, "Defendants"), the dismissal of Plaintiffs' Complaint and the entire Action with prejudice, and the Court's retention of jurisdiction to enforce both the Agreement and the Injunction,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Stipulation is APPROVED by the Court in its entirety, such that:

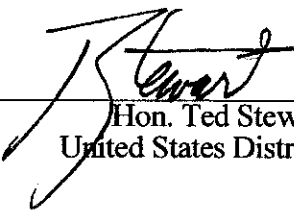
1. Plaintiffs' Complaint and the entire Action shall be, and hereby is, dismissed with prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure;
2. Other than as set forth in the Agreement, each party shall bear his or its own attorneys' fees and costs; and
3. Despite the dismissal of the Action, the Court shall nonetheless retain jurisdiction over the parties and the Action, both (a) to enforce the Injunction and (b) with respect to any subsequent action brought by one or more of the parties to the Action (or his or its successors or assigns) as against one or more of the other parties to the Action (or his or its successors or assigns) to declare, interpret, or

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enforce, or arising from the alleged breach of, the terms and conditions of the Agreement.

DATED:

1/27/05

  
\_\_\_\_\_  
Hon. Ted Stewart  
United States District Judge

Approved as to Form:

WORKMAN | NYDEGGER A PROFESSIONAL CORPORATION

By

Sterling A. Brennan  
Attorneys for Plaintiffs

STOEL RIVES LLP

By

Kenneth B. Black  
Attorneys for Defendants

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cv-01039

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH	
CENTRAL DIVISION	<b>FILED</b>
	CLERK, U.S. DISTRICT COURT
	January 31, 2005 (2:40pm)
	DISTRICT OF UTAH
DALE M. GIBBONS,  Plaintiff,	<b>ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT</b>
vs.	
DOUG LAMBERT, et al.,  Defendants.	
	Case No. 2:02-CV-01244 PGC

This civil rights action arises out of a failed prosecution of plaintiff Dale M. Gibbons. On June 21, 2001, with a signed search warrant in hand, members of the Salt Lake County Sheriff's Office executed a search of Gibbons' home. After they found methamphetamine, Gibbons was arrested and charged with child endangerment, possession of a controlled substance, and dealing in harmful material to a minor. At the time of his arrest, Gibbons was the Chief Financial Officer ("CFO") of a large and well-known Utah bank.

Soon after his arrest, Gibbons resigned from his position with the bank. While the child endangerment count was dismissed before trial, Gibbons was prosecuted on the other two counts. After a full trial in June 2002, Gibbons was acquitted of both charges. Just before his acquittal, Gibbons filed this federal lawsuit alleging 25 federal and state causes of actions. He has claimed

damages in the amount of \$80 million, stemming largely from the loss of his CFO position. Because Gibbons failed to strictly comply with the requirements of Utah's Governmental Immunity Act, the court previously dismissed all state claims in an earlier ruling. Moreover, Gibbons has voluntarily withdrawn the following claims: (1) violation of his *Miranda* rights, (2) taunting or derogatory statements, (3) familial relations claim, (4) "knock and announce" violation, and (5) property damage claims.

After a thorough review of the pleadings, the court finds that summary judgment in favor of the defendants is appropriate on almost all of Gibbons' remaining claims. As to one claim — the claim that drugs were planted in Gibbons' home — there remains a genuine issue of material fact that prevents the court from granting summary judgment. Therefore, defendants' motion for summary judgment on all remaining federal claims is hereby GRANTED IN PART and DENIED IN PART. Furthermore, because of the complexity of the damages issue present in this case, the court hereby orders that all issues relating to damages be bifurcated from proceedings in which liability will be determined, as allowed under Federal Rule of Civil Procedure 42(b). If necessary, damages will be addressed in separate, subsequent proceedings.

### **BACKGROUND**

This civil rights action arises out of the execution of a search warrant at Gibbons home located in Holladay, Utah. The named defendants are officers of the Salt Lake County Sheriff's Office (Sheriff Aaron Kennard, Sergeant Darren Carr, Officer Doug Lambert, Officer Jason Mazuran, and Deputy Brett Stewart), attorneys in the Salt Lake County prosecutor's office (District Attorney David Yocom, Deputy District Attorney Kent Morgan, and District Attorney Serena

Wissler), Salt Lake County itself, and John Does 1-40. Gibbons argues that all named defendants were significantly involved in events leading up to and following the search of Gibbons' home, including Gibbons' arrest. On the defendants' motion for summary judgment, the court takes all facts in the light most favorable to Gibbons. Viewed in that light, the court finds the following facts are sufficiently supported.

## **THE INVESTIGATION**

### *Alarm Drop*

On October 8, 2000, Salt Lake County Sheriff Deputy Bret Stewart and his partner responded to an "alarm drop" call at Gibbons' home. An "alarm drop" call is in response to a burglar alarm; the security company notifies law enforcement dispatch when the security system has been tripped. Deputy Stewart had never been to Gibbons' home on any previous occasion and had never before investigated Gibbons or his residence before that date. Upon arriving at Gibbons' home, the deputies were met by Veronica Gibbons — Mr. Gibbons' wife, although they were separated at the time — who told the deputies that four intruders were inside. While looking for the individuals, Deputy Stewart found in plain view drug paraphernalia: a ceramic or glass pipe, a spoon with residue, a lighter, a hanger, baking powder, and numerous nitrous oxide cartridges. Officer Lambert later testified that he performed a field test, which resulted in the pipe testing positive for cocaine.

Deputy Stewart requested that an identification technician come to the home. The technician subsequently arrived and photographed each of the items the deputies identified. At that point, Deputy Stewart collected what he believed to be pertinent evidence and booked it into evidence. Then, after interviewing four of the five individuals who had been in the home — one individual had



fled before the deputies' arrival — he learned that one of the four had an outstanding arrest warrant. That individual was arrested. After the arrest, Deputy Stewart spoke to Veronica Gibbons, who told him that she was not the homeowner, but that the home was owned by Mr. Gibbons.

Deputy Stewart did not do any further significant investigation of the Alarm Drop (aside from booking the arrested individual into jail and booking the evidence into police custody). Additionally, Deputy Stewart also tried calling Mr. Gibbons by using a cell phone number Veronica Gibbons gave him. Deputy Stewart left a message for Mr. Gibbons regarding the incident, but he never responded. It was not until July 13, 2001, that Deputy Stewart revisited the case. On that day, Deputy Stewart received a notice asking him to determine whether the case was going to proceed with criminal charges or if it could be closed. If a case is ready to be closed, the notice instructs the officer to destroy any property seized in connection to the newly closed case. According to Deputy Stewart's testimony, he examined the facts of the case and, as the assigned officer of the case, knew that he would not be pursuing any criminal charges regarding the paraphernalia seized. He therefore concluded that there was no further need to retain the glass pipe, the spoon, and other seized evidence. Despite knowing of Gibbons arrest on the later incident in June (discussed below), Deputy Stewart authorized the destruction of the evidence from the Alarm Drop. This authorization was given despite the fact that Gibbons' defense counsel on the later incident had about a week earlier, on July 5, 2001, served the prosecution with discovery requesting the pipe and spoon. The evidence was destroyed sometime shortly after Deputy Stewart gave the authorization.

### *Trash Covers*

On October 28, 2000, Officer Lambert directed a “trash cover” to be performed at Gibbons’ home. A trash cover refers to a method of investigation in which law enforcement personnel empty an individual’s garbage can when it is placed on the street (before being emptied by a disposal service). After emptying the can’s contents, law enforcement personnel identifies and seizes any items that are helpful in any ongoing investigation. From that single trash cover, a number of seemingly incriminating items were found, including:

- Empty boxes of nitrous oxide chargers (5)
- Empty cartridges bearing nitrous oxide labels (79)
- A large empty balloon
- A pornographic magazine entitled “Teen Sex”
- Empty plastic tubes for snorting (4)
- A razor blade with burned edges
- An empty 1” x 1” plastic baggie with a crystalline residue
- A crushed beer can fashioned into a smoking device
- Invitations to rave parties (2)
- A rave Trance-Mission ticket with a closed bobby pin attached
- A brown bottle containing a white crystalline residue around the top, bearing the label reading “Ketamina Chemnova.”

Officer Lambert performed field tests on the beer can and brown bottle, testing only for opiates, cocaine, and methamphetamine. The tests were negative. Another trash cover was conducted approximately a week later. Nothing significant was found.

### *Informant Information*

Officer Lambert asserts that he received information from three informants that helped him build a case against Gibbons before the search of his home. Specifically, Officer Lambert states that Rian Wilson, Ryan Morgan, and one confidential informant admitted that Gibbons had hosted rave parties and supplied illegal substances to his guests, several of which were minors. In describing a

conversation between Ryan Morgan and Officer Lambert at which Officer Mazuran was present,

Officer Mazuran stated:

[T]he things that I do remember about that conversation was [Ryan] Morgan talking about Dale Gibbons, talking about his parties, talking about the amount of drugs that he provided at his parties and the amount of drugs he had access to, some of the other things that went on at his parties.

Rian Wilson and Ryan Morgan have since disavowed providing any such information to Officer Lambert. In an effort to corroborate the information they claim to have received from informants, defendants have submitted to the court nearly a half-dozen transcripts from depositions given by those that had attended many of Gibbons' parties, Gibbons' housekeeper, and Gibbons' driver. These depositions all report that Gibbons was a heavy drug user and openly consumed drugs during his many parties. Many of the depositions provide details regarding where Gibbons would keep drugs — some specifically referred to the night stand where police later found a baggie of methamphetamine — and the methods by which he would prepare and consume the different drugs. Furthermore, the depositions also give accounts of Gibbons giving drugs to his 15-year old daughter, as well as taking her to different night clubs where he provided her large amounts of alcohol. The court, however, must only look to what defendants knew at the time of the search. Therefore, in reaching its decision, the court has in no way considered the numerous statements alleging — with even more specificity than the informants — Gibbons' drug use, the specific location of the drugs in his house, his on-going drug use with his daughter at both home and in public, and his distribution of a variety of drugs (including cocaine, methamphetamine, and ketamine) to dozens of his guests, several of whom were minors.

### *Emergency 9-1-1 Call*

On June 11, 2001, at approximately 4 a.m., Gibbons made an emergency call to 9-1-1. In that call, Gibbons requested an ambulance be sent to assist his 19-year old girlfriend. According to what Gibbons told the emergency dispatcher, Cynthia Snowden was unconscious and had perhaps attempted suicide. Gibbons also informed the dispatcher that she may have been raped four hours earlier.

Responding medical personnel arrived at Gibbons' home and found Snowden laying completely nude on Gibbons' bed in an unresponsive and comatose state. While attending to Snowden, emergency personnel became aware of another young woman: Gibbons' fifteen-year old daughter ("R.G."), who like Snowden was found lying in her bed in an unresponsive and comatose state. Some of those who responded to the 9-1-1 call, in addition to an emergency room nurse, told law enforcement that they suspected both young women to be suffering from a GHB overdose. GHB, an acronym for the chemical gamma hydroxy butyrate, is a "club drug" often used to incapacitate individuals for the commission of sexual assault and rape; it is considered a controlled substance under Utah law.<sup>1</sup> Both young women were rushed by ambulance to the hospital. At the time Officer Lambert applied for the search warrant, he was unaware of what substances either young woman had actually taken.

In an effort to determine whether there were more individuals in need of medical attention, law enforcement and emergency personnel performed a "protective sweep" of the house. No other individuals were found. During the sweep, however, hardcore pornographic materials (namely

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<sup>1</sup>Utah Code Ann. § 58-37-4(2)(a)(vii).

videos, dvds, and magazines) were found in closets, gathering spaces, and bedrooms. Other items noticed by emergency personnel throughout the house included, among other things, a camera tripod standing near the foot of the bed where Snowden was found lying nude and unconscious, handcuffs in that same bedroom, chains with straps and buckles, black leather straps with chrome buckles, and a stockade large enough to detain an average-sized adult.

While both young women were being attended to, Gibbons looked on and did not volunteer any information regarding their condition, nor did he bother informing anyone that his 15-year old daughter was also unconscious in another room. As described to Officer Lambert by Officer Goldberg, law enforcement officers found Gibbons in his house in an intoxicated state. Gibbons' speech was slurred, he was uncooperative and unwilling to provide any helpful information regarding Snowden and R.G.. Officer Lambert was further informed by Officer Goldberg that there were many items of a sexual nature in plain view. Officer Golberg also discovered an unused syringe in the bathroom. As described by ambulance personnel Rosalie Kiddle, whose report was used by Officer Lambert in obtaining the search warrant, Gibbons was "acting funny" and "didn't seem too concerned that there were cops, firemen and EMTs in his home at four a.m. in the morning, and he didn't seem concerned about the state of the two girls."<sup>2</sup> "The scene seemed odd because of the way [Gibbons] was acting and the condition of both of the parties."<sup>3</sup>

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<sup>2</sup>Depo. Rosalie Kiddle, at 29-32.

<sup>3</sup>*Id.*

## **THE SEARCH WARRANT AND SUPPORTING AFFIDAVIT**

On June 18, 2001, Officer Lambert, with help from Deputy District Attorney Wissler, prepared an affidavit for a search warrant detailing the investigative activities. While Sergeant Carr and Officer Mazuran did not participate in the physical preparation of the supporting affidavit, Officer Lambert consulted both officers regarding whether there was sufficient probable cause to justify a search warrant.<sup>4</sup> Regarding whether Officer Lambert sought either Sergeant Carr's or Officer Mazuran's advice on whether probable cause existed, Lambert testified in his deposition:

Not necessarily their advice, but more over to make sure as a unit, we have the necessary requirements to establish the facts of the probable cause. Kind of a check and balance to make sure that everybody is comfortable with the investigation.<sup>5</sup>

The affidavit requested an approach under the cover of darkness in the night time hours to afford the best possibility for officer safety based on belief that the suspect used counter-surveillance measures to avoid detection. Further support for Officer Lambert's request for a search under the cover of darkness was the fact that Gibbons' home was in a residential neighborhood where children were often seen walking during the daytime.

As grounds for the search warrant, Officer Lambert provided facts detailing incidents involving Gibbons. More specifically, Officer Lambert outlined three primary events: (1) the October 10, 2000, Alarm Drop; (2) the trash cover conducted under the direction of Officer Lambert on October 24, 2000; and (3) and the June 11, 2001 9-1-1 Call made by Gibbons. In addition to

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<sup>4</sup>Depo. Doug Lambert, at 22:14-22; 24:13-25:2.

<sup>5</sup>*Id.*

those three events, the affidavit provided further information from police call logs (the “Call Logs”) and from three informants, Ryan Wilson, Rian Morgan, and one confidential informant. The affidavit recounted:

Your affiant has received several complaints from several unrelated sources that [Gibbons’ home] has been and continues to be a place for the ongoing use of controlled substances. An informant, Ryan Wilson, took me to this address and named Dale Gibbons as having been the host of several drug parties which included the use and distribution of controlled substances to adults and minors alike[,] [i]ncluding but not limited to GHB, Ketamine, and Ecstasy.

All complaints received by your affiant were similar in nature and named Dale Gibbons as a habitual drug user. All reports described the use of Ketamine, GHB, and Ecstasy on a frequent basis at the residence and were commonly used as Sexual Enhancers by Dale Gibbons and guests of his home. It was also reported to your affiant that there has been situations amounting to possible sexual assaults on many young females, which have never been reported to Police.

In describing the 9-1-1 Call, Officer Lambert stated that “[i]t was suspected that [Snowden] was suffering a GHB overdose.” The affidavit also described R.G. as having “suffer[ed] an apparent GHB overdose.” Officer Lambert cited an emergency room nurse, Gene Miner, as the source of the GHB suspicion. Along with the description of the two young women found comatose in Gibbons’ home that night, the affidavit also referred to the pornographic material observed in the home:

As Deputies checked the house for additional victims they noticed a great deal of [p]ornographic material around the house within immediate access to the 15 y[ea]r old daughter. Pursuant to the Deputies continuing the protective sweep of the residence deputies observed a room that appeared to be dedicated to sexual activities. . . . In the center of the room was a stockade large enough to fit an adult human being. In addition the room contained numerous items of pornography.

The affidavit contained further descriptions of the Emergency 9-1-1 Call: “Deputy John Wester conducted several interviews of the responding medical personnel who described the scene as ‘Strange and Suspicious[,]’ [s]ince the Complainant / Suspect was telling them that Cynthia

Snowden had been raped four hours earlier, yet she was naked in his bed, unconscious and unresponsive.” The affidavit continued:

Salt Lake County Fire Personnel noticed that there was a video camera on a tri-pod stand facing the bed. Responding personnel also noticed drug paraphernalia (syringes) scattered around the room, as well as sexual related toys. . . . These observations added to the medical personnel’s suspicion of Dale Gibbons and the story he was giving.

The affidavit was presented to and signed by Utah state court Judge Judith Atherton.

### **SEARCH AND ARREST**

In the early morning of June 18, 2001, after conducting a preparatory meeting, Officer Lambert led a dozen or so law enforcement officers to Gibbons’ home. All were dressed in plain clothes, with the exception of tactical vests. After climbing over the gate surrounding Gibbons’ property, the officers approached Gibbons’ door and knocked. While Gibbons denies ever hearing a knock, the testimony of every officer there suggests that Sergeant Carr knocked, waited 15-20 seconds for a response, and knocked again. Again receiving no response, Carr gave approval to forcefully enter Gibbons’ home. Gibbons has testified that he and Snowden were in bed at the time he heard the sheriffs enter.

Upon entering the home, the officers quickly found a naked Gibbons, announced themselves as police — officer testimony asserts that they announced themselves immediately upon opening the front door — and ordered him to lie on the ground. Officer Lambert and Officer Evan Mallas stood over Gibbons with their guns. Officer Lambert was using an assault rifle, and had it pointed directly at Gibbons. Gibbons claims that the gun’s nozzle was pressed to his back, but states that “[i]t wasn’t



pressed in hard, really, but it was, you know, some pressure.”<sup>6</sup> Gibbons remembers the gun being held to his back for “several seconds.” Within a minute of being ordered to the ground, Gibbons was handcuffed, helped to his feet, and allowed to get dressed. Snowden was thereafter found in the master bedroom. She was directed to get out of the bed and then was taken to get dressed. Once both were dressed, they were escorted downstairs where officers attempted to interview them.

While searching the master bedroom where Gibbons and Snowden were found, Officer Mazuran soon found a baggie of suspected methamphetamine. According to his deposition testimony, Officer Mazuran opened a dresser drawer, saw the baggie, and then requested someone to photograph it. Once the drawer’s contents were photographed, the baggie was seized and documented. This fact is disputed by Gibbons, who claims that the baggie was planted by law enforcement. Gibbons concedes that he saw nothing or knows nothing regarding any specific involved with evidence tampering or planting, as this excerpt from his deposition makes clear:

Q: Did you ever see anybody place the baggie in the night stand in the bedroom?

A: No.

Q: Do you know of any witness who will testify that they saw a police officer place the baggies in the night stand?

[Discussion with Counsel]

Q: You don’t know of any witness that will so testify?

A: No.

Q: I guess that’s do you know of a witness that will testify that they saw a police officer place the baggies in the night stand?

A: No.

Gibbons, however, has presented to the court photographs of the drawer in question that fail to show the methamphetamine. At approximately 6:37 a.m., a video technician recorded images of

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<sup>6</sup>Dale Gibbons Depo. V.II, at 885.

the night stand. No baggie can be seen on the video. About fifty minutes *later*, at approximately 7:29 a.m., Officer Lambert took a digital photograph in which the baggie can be clearly seen laying on top of several items in the same night stand drawer.

After seizing the baggie, law enforcement personnel confiscated several other items in the home that they believed were significant in a potential case against Gibbons. In his deposition, Gibbons admits to there being sexually oriented materials in his bedroom:

Q: Tell me what kind of items [Snowden] kept [in the master bedroom]?

A: . . . [S]he had a dildo thing. A vibrator. Stuff like that. We had bought some videos together.

Q: How many of those items were there in the master bedroom?

A: Probably, I don't know, four or five.

Aside from the sexual toys mentioned by Gibbons, other seized items found throughout the home were pornographic materials (magazines, videos, and dvds), a leather whip, three pairs of handcuffs, a vibrator, nitrous oxide cartridges, rave party paraphernalia, syringes, and six bottles of an unknown liquid. Law enforcement also found business cards listing Gibbons' employment. It was at this point that they became aware that Gibbons was the CFO of a large and well-known Utah bank. There is no evidence that anyone involved with the investigation knew of Gibbons' employment before this time.

## **THE MEDIA**

After the home was secured, Sergeant Carr called a member of the media and informed him that a search warrant had just been executed in Holladay — the Utah city where Gibbons' home is located. Gibbons testified that before being escorted outside and into a police vehicle, he heard someone say that "they" (the officers escorting Gibbons to jail) needed to wait a few more minutes

for “them” to set up. According to Gibbons, he was escorted by a single deputy from his garage to a truck located in his driveway approximately 30 feet from his garage. During his walk to the truck, Gibbons noticed a camera crew filming outside the gates of his home. Gibbons testified that he never saw a single member of the media on his property, but did see some standing off his property, approximately 40 feet from the truck. Aside from the officer taking a moment — five seconds — to rearrange something in his truck, Gibbons was immediately placed in the truck and taken to the county jail. In all, Gibbons stated that it took just “a minute” to take him from his house and place him inside the deputy’s truck.

At the scene, Sergeant Carr was interviewed and answered questions from a local television station about the arrest. Immediately following Gibbons’ arrest, Peggy Faulkner, then the public information officer for the Sheriff’s Office, received calls from the media regarding the Gibbons investigation. Faulkner immediately called Sergeant Carr and asked if he would respond to the calls. Kent Morgan, a county prosecutor, informed the Sheriff’s Office on the night of the arrest that all media contacts were to be authorized by him. Despite this advice, the Sheriff’s Office chose to hold its own press conference on the day following the arrest. Due to the public’s strong interest in the investigation (it was soon reported by the media that Gibbons was the CFO of a large Utah bank), on the day following the arrest, Sergeant Carr held a press conference during which he encouraged anyone who had information regarding any illegal activity associated with Gibbons, or anyone who felt that they were perhaps sexually assaulted during one of Gibbons’ parties, to contact the Sheriff’s Office.

Gibbons was subsequently charged with three crimes — child endangerment, possession of a controlled substance, and dealing in harmful material to a minor. While the child endangerment count was dismissed before trial, Gibbons was prosecuted for the other two counts. In June 2002, following a full trial, Gibbons was acquitted on both charges. Just before the acquittal, Gibbons filed this federal case alleging 25 federal and state causes of actions.

### **SUMMARY JUDGMENT STANDARD**

In considering defendants’ summary judgment motion, if “there is not a genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>7</sup> The evidence must be viewed in the light most favorable to the non-movant, but he must present sufficient admissible evidence to demonstrate that there remains a genuine issue of material fact in dispute.<sup>8</sup>

Under rule 56(c), the moving party has the initial burden to show that “there is an absence of evidence to support the nonmoving party’s case.”<sup>9</sup> Upon making such a showing, the burden shifts from the moving party to the nonmoving party, who must then “make a showing sufficient to establish that there is a genuine issue of material fact regarding ‘the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.’”<sup>10</sup> “When, as in this case, the moving party does not bear the ultimate burden of persuasion at trial, it may satisfy its

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<sup>7</sup>Fed. R. Civ. P. 56(c).

<sup>8</sup>*Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1536-37 (10th Cir. 1995) (citing *Conaway v. Smith*, 853 F.2d 789, 792 n. 4 (10th Cir. 1988)).

<sup>9</sup>*Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

<sup>10</sup>*Gross*, 53 F.3d at 1537 (quoting *Celotex Corp.*, 477 U.S. at 322)

burden by pointing to a ‘lack of evidence for the nonmovant on an essential element of the nonmovant’s claim.’”<sup>11</sup>

Gibbons may not rest upon “the mere allegations or denials of [his] pleading . . . .”<sup>12</sup> To avoid summary judgment, Gibbons must go beyond the pleadings and establish that there is a genuine issue of material fact that must be resolved by the trier of fact.<sup>13</sup> In so doing, he must designate “*specific* facts showing that there is a genuine issue for trial”<sup>14</sup> and “must present affirmative evidence in order to defeat a properly supported summary judgment motion.”<sup>15</sup> “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”<sup>16</sup> Summary judgment is proper when the trial judge can conclude that no *reasonable* trier of fact could find for the nonmovant on the basis of evidence presented in the motion and the response.<sup>17</sup>

**CLAIMS AGAINST SALT LAKE COUNTY, SALT LAKE COUNTY SHERIFF AARON KENNARD, SALT LAKE COUNTY DISTRICT ATTORNEY DAVID YOCOM, AND SALT LAKE COUNTY DEPUTY DISTRICT ATTORNEY KENT MORGAN**

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<sup>11</sup>*Sports Unlimited, Inc. v. Lankford Enterprises, Inc.*, 275 F.3d 996, 999 (10th Cir. 2002) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998)).

<sup>12</sup>*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

<sup>13</sup>*Celotex Corp.*, 477 U.S. at 324.

<sup>14</sup>*Id.* (emphasis added).

<sup>15</sup>*Anderson*, 477 U.S. at 257.

<sup>16</sup>*Id.* at 252.

<sup>17</sup>*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The many claims Gibbons has filed in this case include several “failure to supervise” claims against Salt Lake County, Salt Lake County Sheriff Aaron Kennard, Salt Lake County District Attorney David Yocom, and Salt Lake County Deputy District Attorney Kent Morgan. The following claims are grounded in his assertion that these defendants failed to properly supervise certain subordinates: conspiracy, violation of Gibbons’ Fourth Amendment rights, and a substantive due process claim for failure to return his property. Gibbons, however, has failed to provide any meaningful evidence demonstrating that any of the defendants were significantly involved in any of the incidences that underlie his claims. Title 42 U.S.C. § 1983 provides in relevant part:

Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>18</sup>

While the statute allows a plaintiff to assert a claim against these defendants, Gibbons’ lack of evidence forces the court to dismiss all claims against the County and these defendants.

### ***Salt Lake County***

Although “municipalities and other local government bodies are ‘persons’ within the meaning of § 1983,”<sup>19</sup> “a municipality may not be held liable under § 1983 solely because it employs

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<sup>18</sup>(Emphasis added).

<sup>19</sup>*Board of County Comm’rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 402-03 (1997) (citing *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 689 (1978)).

a tortfeasor.”<sup>20</sup> The legal doctrine of *respondeat superior* has no place in suits against a municipality.<sup>21</sup> Instead, “a plaintiff seeking to impose liability on a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.”<sup>22</sup>

Gibbons has failed to present any evidence that any of the questionable actions he alleges were done in accord with County policy or custom. Rather, Gibbons points only to Salt Lake County’s alleged failure to enforce a policy regarding media-related actions, failure to have policies detailing the proper destruction of evidence, and for its failure to properly train certain deputies and prosecutors. Looking at this limited evidence, Gibbons falls well short of demonstrating “that through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, [Gibbons] must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.”<sup>23</sup>

Because Gibbons is also “seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate [his] rights”<sup>24</sup> — Gibbons asserts that he was

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<sup>20</sup>*Id.* at 403.

<sup>21</sup>*Id.* (“We have consistently refused to hold municipalities liable under a theory of *respondeat superior*.”) (citing *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818 (1985) (plurality opinion); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989)).

<sup>22</sup>*Id.* at 403-04.

<sup>23</sup>*Id.* at 404 (emphasis in original).

<sup>24</sup>*Id.* at 407.

harm[ed] because of the sheriff department’s failure to adequately train its deputies — Gibbons “must [also] demonstrate that the municipal action was taken with ‘deliberate indifference’ as to its known or obvious consequences.”<sup>25</sup> In contrast to some other cases, there is no evidence here that the municipality was aware of, and acquiesced in, a pattern of constitutional violations.<sup>26</sup> Without such evidence, and for other reasons already stated, Gibbons’ claims against Salt Lake County cannot survive defendants’ summary judgment motion.

***Sheriff Aaron Kennard and District Attorney David Yocom***

There is no evidence that Sheriff Kennard or District Attorney Yocom were personally involved in any constitutional violations Gibbons alleges. In a § 1983 claim, a supervisor is not liable “unless an ‘affirmative link’ exists between the constitutional deprivation and either the supervisor’s personal participation, his exercise of control or direction, or his failure to supervise.”<sup>27</sup> Gibbons has merely presented conclusory allegations as proof that either Sheriff Kennard or District Attorney Yocom participated or acquiesced in the constitutional deprivations of which the complaint is made.<sup>28</sup> Further, while there may be room for improvement in the way in which Officer Lambert and some others conducted themselves during the investigation, much more is required to hold the supervisors in this matter liable. “A supervisor or municipality may be held liable where there is

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<sup>25</sup>*Id.*

<sup>26</sup>*See Canton*, 489 U.S. at 397 (O’Connor, J., concurring in part and dissenting in part).

<sup>27</sup>*Meade v. Grubbs*, 841 F.2d 1512, 5127 (10th Cir. 1988) (citations omitted).

<sup>28</sup>*See Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976).



essentially a *complete* failure to train, or training that is so reckless or grossly negligent that future misconduct was almost inevitable.”<sup>29</sup>

There is no evidence that either Sheriff Kennard or District Attorney Yocom knew of the misrepresentations or omissions alleged by Gibbons. There is no evidence that either Sheriff Kennard or District Attorney Yocom knew of the possibility that certain defendants had planted evidence in Gibbons’ home. There is nothing more than mere allegations as to Gibbons’ claim that Sheriff Kennard and District Attorney Yocom knew of or participated in a conspiracy against Gibbons. And finally, there is no evidence that any failure to enforce media policies or any other policy was the proximate cause of any of Gibbons’ injuries. Based on the lack of evidence presented by Gibbons as to any affirmative link between Sheriff Kennard and District Attorney Yocom, all claims against both these defendants are dismissed.

***Deputy District Attorney Kent Morgan***

As with the claims against Sheriff Kennard and District Attorney Yocom, Gibbons has failed to carry his burden of providing evidence to show that Deputy District Attorney Morgan, as Deputy District Attorney Wissler’s supervisor, failed to train or supervise her or so recklessly trained or supervised her that future constitutional violations were inevitable. Because Gibbons has not met this burden, his claims against Deputy District Attorney Morgan are dismissed. Gibbons’ claim against Deputy District Attorney Morgan for defamatory statements to the press is also dismissed, for reasons discussed below.

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<sup>29</sup>*Meade*, 841 F.2d at 1528.

## PROBABLE CAUSE — GIBBONS' FOURTH AMENDMENT CLAIMS

Gibbons' § 1983 claim is centered upon his allegation that the search on his home was executed without probable cause, an allegation that, if true, would constitute a violation of the Fourth Amendment. A search warrant must be supported by probable cause — “more than mere suspicion but less evidence than is necessary to convict.”<sup>30</sup> “An affidavit in support of a search warrant must contain facts sufficient to lead a prudent person to believe that a search would uncover contraband or evidence of criminal activity.”<sup>31</sup> When reviewing a judge's finding of probable cause for the issuance of a search warrant, the court “must consider the totality of the circumstances and determine whether the affidavit established the probability that evidence of criminal activity would be located in the desired search area.”<sup>32</sup> Great deference is given to a magistrate's determination that probable cause existed;<sup>33</sup> the court asks only “whether the issuing magistrate had a ‘substantial basis’ for determining probable cause existed.”<sup>34</sup> Because Gibbons argues that the affidavit contained numerous misrepresentations and omissions, the court must address whether those disputed portions are grounds for denying defendants' summary judgment motion.

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<sup>30</sup>*United States v. Burns*, 624 F.2d 95, 99 (10th Cir. 1980), *cert. denied*, 449 U.S. 954 (1980).

<sup>31</sup>*United States v. Danhauer*, 229 F.3d 1002, 1005-06 (10th Cir. 2000)

<sup>32</sup>*United States v. Wittgenstein*, 163 F.3d 1164, 1171 (10th Cir. 1998), *cert. denied*, 527 U.S. 1012 (1999).

<sup>33</sup>*Wittgenstein*, 163 F.3d at 1172.

<sup>34</sup>*Id.* (quoting *Lawnmaster v. Ward*, 125 F.3d 1341, 1348 (10th Cir. 1997)).

“It is a violation of the Fourth Amendment for an affiant to knowingly and intentionally, or with reckless disregard for the truth, make a false statement in an affidavit. Where a false statement is made in an affidavit for a search warrant, the search warrant must be voided *if* the affidavit’s remaining content is insufficient to establish probable cause.”<sup>35</sup> Similarly, “[i]n a case where the [plaintiff] alleges information was intentionally omitted from an affidavit, the existence of probable cause is determined by examining the affidavit as if the omitted information had been included and determining whether the affidavit would still give rise to probable cause.”<sup>36</sup>

Even assuming all the statements Gibbons argues are false or misrepresented were found to be so, none were critical to the probable cause determination. Gibbons asserts, among other things, that Lambert, and others, inserted false statements from informants, misrepresented the alarm drop to be an arrest warrant call, and omitted facts regarding the likelihood of seized paraphernalia belonging to the “intruders” found by Stewart during a response to an alarm call. Assuming these allegations are true, “the next step in the analysis requires that the court examine the affidavit to determine whether inclusion of that information would have vitiated probable cause.”<sup>37</sup> Unlike this court’s decision in *Haywood* where the false information “was the *sole* source of the information in the affidavit, and there was no independent corroboration of the information provided by him,”<sup>38</sup> defendants had numerous facts corroborating any information received by informants. Specifically,

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<sup>35</sup>*U.S. v. Basham*, 268 F.3d 1199, 1204 (emphasis added), *cert. denied*, 535 U.S. 945 (2002).

<sup>36</sup>*Id.* (citing *Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996)).

<sup>37</sup>*Haywood v. Nye*, 999 F. Supp. 1451, 1458-59 (D. Utah 1998).

<sup>38</sup>*Id.* at 1459.

the items found in the trash cover (e.g., empty boxes of nitrous oxide chargers, empty nitrous oxide cartridges, an empty plastic tubes for snorting, a razor blade with burned edges, an empty 1” x 1” plastic baggie with a crystalline residue, a crushed beer can fashioned into a smoking device, and a brown bottle containing a white crystalline residue around the top, bearing the label reading “Ketamina Chemnova”) and the statements by medical and law enforcement personnel who responded to the 9-1-1 call on June 11, 2001 (e.g., two women found unresponsive, pornographic material, and bondage instruments) were sufficient to provide independent sources of probable cause. The question then becomes whether if all the information known to Lambert — the information Gibbons alleges was misrepresented or omitted — had been disclosed to the judge, would she nonetheless have found probable cause.

Gibbons argues probable cause would not have existed, arguing primarily that the information provided by “several” informants that was included in the affidavit was false and insufficient to establish probable cause. Regarding such a claim, the Tenth Circuit has held that “[w]hen there is sufficient independent corroboration of an informant’s information, there is no need to establish the veracity of the informant.”<sup>39</sup> In support of his argument, Gibbons relies heavily on the Tenth Circuit’s decision in *United States v. Danhauer*.<sup>40</sup> In *Danhauer*, a confidential informant reported to the police that Danhauer was cooking methamphetamine in his garage.<sup>41</sup> In addition to statements from the confidential informant, the search warrant affidavit also included information

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<sup>39</sup>See *United States v. Sturmoski*, 971 F.2d 452, 457 (10th Cir. 1992).

<sup>40</sup>229 F.3d 1002 (10th Cir. 2000).

<sup>41</sup>*Id.* at 1004.

regarding Danhauer's past criminal history.<sup>42</sup> The court found that the affidavit failed to allege facts sufficient to establish probable cause. In reaching its decision, the court reasoned that the affiant

[N]either established the veracity of the informant, nor obtained sufficient independent corroboration of the informant's information. The only police corroboration of the informant's information was the affiant's verification of the Danhauer residence's physical description, a records check to confirm that the Danhauers resided at the premises in question, observation of [Danhauer] coming and going from the house to the garage, and a search of the Danhauers' criminal histories . . . .<sup>43</sup>

Unlike in *Danhauer*, the magistrate judge in this case did not base her decision merely on information from an informant and an officer's quick review of Gibbons' criminal history. The undisputed facts in this case gave the judge enough reason to make a common-sense decision that there was probable cause. First, the affidavit listed numerous items confiscated during a trash cover conducted on October 24, 2000 (79 empty cartridges bearing Nitrous Oxide labels and the like). The Tenth Circuit has found similar evidence seized from trash covers sufficient corroboration to satisfy the probable cause standard.<sup>44</sup> In *United States v. Le*, the court found that information gained from two confidential informants was sufficiently corroborated by evidence seized in a trash cover, namely a "used ziploc baggie with a white powder residue inside of it."<sup>45</sup>

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<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*See United States v. Le*, 173 F.3d 1258, 1266 (10th Cir. 1999) (concluding that affiant's search of suspect's trash and discovery of used bag with white powder residue confirmed to the methamphetamine helped corroborate information received from confidential sources).

<sup>45</sup>*Id.*

In addition to the trash cover, the other information in the warrant was further corroborated with the strange circumstances surrounding the 9-1-1 call on June 11, 2001. On June 11, 2001, Gibbons called 9-1-1 requesting an ambulance for 19-year old Cynthia Snowden. During the phone call, Gibbons told police that she may have been raped four hours earlier and may have attempted suicide. According to statements by the responding officers, Snowden was found naked and comatose on Gibbons' bed. When asked about what happened, Gibbons failed to provide any helpful information, including that his 15-year old daughter, R.G., was also in a comatose state in another room in the house. Only because responding personnel quickly surveyed the home was R.G. found. She was found lying comatose in a bed, suffering from what medical personnel believed to be a drug-overdose. When asked about RG's situation, Gibbons again was uncooperative.

In looking at the totality of the circumstances, the trash cover and June 11, 2001 emergency call are independent corroborations of any information Lambert, or any other defendant, may have alleged to have received from an informant. In short, if the search warrant affidavit had only contained information regarding the 9-1-1 call and the trash cover, that information alone would have been enough for the judge to find probable cause to search Gibbons' home for evidence of illegal drug use. Moreover, because the illegal drugs could have been secreted anywhere in the home, the officers would have had probable cause to search the entire house.

Aside from the informant information, trash cover, and 9-1-1 call, Gibbons further argues that several misrepresentations were made by Lambert during the process of obtaining a search warrant. For example, the affidavit asserts that police were called to Gibbons' residence to effectuate an arrest warrant. In fact, the individual with the outstanding arrest warrant was found

incidental to the alarm drop in October 2000. Considering, however, the amount of other evidence articulated in the supporting affidavit, this alleged misrepresentation is of no significant consequence to the finding of probable cause.

Gibbons also argues that because the information included in the affidavit had become stale at the time of the search, any probable cause that may have existed in October 2000 when the trash cover was conducted, had become stale by the June 11, 2001 incident. The court disagrees. To be sure, “Probable cause to search cannot be based on stale information that no longer suggests that the items sought will be found in the place to be searched.”<sup>46</sup> At the same time, however, the Tenth Circuit has instructed that “more recent events in an affidavit can refresh otherwise dated information.”<sup>47</sup>

Here, police began investigating Gibbons in October 2000. During its investigation, the police performed three trash covers, surveyed the property, and spoke to several informants. Taken alone, it is doubtful that this earlier information would help in establishing probable cause to search Gibbons’ residence in June 2001. But that was not the only information available to the judge when the search warrant was issued. First, the affidavit gives numerous details from the 9-1-1 call,

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<sup>46</sup>*United States v. Snow*, 919 F.2d 1458, 1459 (10th Cir. 1990).

<sup>47</sup>*United States v. Jardine*, 364 F.3d 1200, 1205 (10th Cir. 2004) (citing *United States v. Spikes*, 158 F.3d 913, 924 (6th Cir. 1998) (“[E]ven assuming the information in the affidavit was in some respects ‘stale,’ the more recent events related therein refreshed this otherwise stale information.”); *United States v. Greene*, 250 F.3d 471, 481 (6th Cir. 2001) (finding twenty-three month old information was refreshed by subsequent corroboration from an informant); *United States v. Bucuvalas*, 970 F.2d 937, 940 (1st Cir. 1992) (“Staleness does not undermine the probable cause determination if the affidavit contains information that updates, substantiates, or corroborates the stale material.”)).

including the fact that two females — one a minor — were found in an overdosed-state. Further, one of the females — a 19-year old woman — was found comatose and nude on Gibbons' bed. Second, the affidavit included statements from emergency and medical personnel, including the emergency room nurse — that the two young women had appeared to have overdosed on either GHB or Ketamine. Other responding medical personnel described the scene as “strange and suspicious.” Salt Lake County Fire Personnel noticed that there was camera-tripod facing the bed where the 19-year old woman was found. Third, in performing a protective sweep of the house in an effort to find any other individuals who needed help, the deputies noticed a large amount of pornographic material around the house, most of which was accessible to the Gibbons' 15-year-old daughter. Thus, in making her decision, the judge not only had all the information from October 2000, but also had a detailed account of a suspicious set of circumstances that occurred just days before the request for the search warrant. Taken together, the affidavit's account of the 9-1-1 call on June 11, 2001 “refreshed” the affidavit's earlier facts and further helped establish probable cause for the search.

Nonetheless, even if the court were to find that the previous information obtained from the trash covers and informants had become stale to the point that the 9-1-1 Emergency Call could not refresh that information, the court still finds that the circumstances surrounding the June 11, 2001 event provided sufficient probable cause to justify the search warrant: one 19-year old found nude and comatose on Gibbons' bed, Gibbons' 15-year old daughter found comatose on her bed, an uncooperative Gibbons, and suspicious items found throughout Gibbons' house, e.g., pornographic materials, bondage instruments, a tripod, and an adult-sized stockade.



## CLAIMS AGAINST SALT LAKE COUNTY DEPUTY DISTRICT ATTORNEY SERENA WISSLER

Even if there were no probable cause, Deputy District Attorney Wissler would nevertheless be shielded from liability by the absolute immunity doctrine. “[P]rosecutors are absolutely immune from suit under § 1983 concerning activities ‘intimately associated with the judicial . . . process,’ such as initiating and pursuing criminal prosecutions.”<sup>48</sup> In articulating this bright line immunity, the Tenth Circuit reasoned that “[t]he rationale for granting absolute immunity . . . is to allow prosecutors . . . ‘the latitude to perform their [quasi-judicial] tasks absent the threat of retaliatory § 1983 litigation.’”<sup>49</sup> While this immunity is absolute, it only applies to “a prosecutor’s actions in connection with the judicial process” and not “those that are primarily investigative or administrative in nature.”<sup>50</sup> In making this distinction, “courts have recognized that absolute immunity may attach even to such administrative or investigative activities ‘when these functions are necessary so that a prosecutor may fulfill his function as an officer of the court’”<sup>51</sup> — “[e]ven purely investigative acts are accorded qualified ‘good faith’ immunity, however.”<sup>52</sup>

Gibbons bases his § 1983 claim against Deputy District Attorney Wissler on grounds that she knowingly sought a search warrant without probable cause. According to Gibbons, Wissler helped in the physical preparation of the search warrant and had given Officer Lambert her opinion during

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<sup>48</sup>*Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1489 (10th Cir. 1991).

<sup>49</sup> *Id.* at 1489-90 (quoting *Snell v. Tunnell*, 920 F.2d 673, 686-87 (10th Cir. 1990)).

<sup>50</sup> *Pfeiffer*, 929 F.2d at 1490.

<sup>51</sup> *Id.* (quoting *Snell*, 920 F.2d at 693).

<sup>52</sup> *Id.* at n. 6 (citing *Rex v. Teeple*s, 753 F.2d 840, 843 (10th Cir. 1985)).

the investigation as to whether probable cause existed. In *Kalina v. Fletcher*, the Supreme Court declared that all of the following matters call for a prosecutor's exercise of professional judgment: the determination that the evidence was sufficiently strong to justify a probable-cause finding, the decision to file charges, the presentation of the information to the court, the drafting of the certification, and even the selection of the particular facts to include in the certification to prove the evidentiary support for the finding of probable cause.<sup>53</sup> The U.S. District Court for the District of Kansas applied that decision in *Van Deelen v. City of Eudora, Kan.*<sup>54</sup> There, the prosecutor, upon reading the law enforcement officer's report, made a determination that probable cause for prosecution existed.<sup>55</sup> After that, the same prosecutor drafted the complaint filed against plaintiff and made other independent determination regarding the officer's report.<sup>56</sup> The plaintiff sought to label the prosecutor's actions as investigatory and outside the scope of his judicial role because the district attorney admittedly made an independent determination whether probable cause existed.<sup>57</sup> Further evidence used by the plaintiff was the prosecutor's giving of advice to the police chief about the need for additional investigation and with the prosecutor's signing the criminal complaint as the complainant in support of the arrest warrant.<sup>58</sup> In applying the Court's conclusion that "the duties

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<sup>53</sup>See 522 U.S. 118, 129-31 (1997).

<sup>54</sup>53 F. Supp. 2d 1223 (D. Kan. 1999).

<sup>55</sup>See *id.* at 1228-29.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*Id.*

of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom,”<sup>59</sup> the district court held that the prosecutor was “entitled to absolute immunity for his prosecutorial actions in reviewing and evaluating the evidence found in the police offense reports and witness statements, in determining that the evidence was sufficient to support a finding of probable cause, and in deciding to file charges.”<sup>60</sup>

Here, Gibbons claims that Deputy District Attorney Wissler waived her absolute immunity by driving past Gibbons’ home during the investigation, instructing Officer Lambert to gather information from certain individuals in preparation of applying for a search warrant, and being Officer Lambert’s scribe — Wissler typed the warrant’s supporting affidavit as Officer Lambert dictated its contents. This evidence, without more, is insufficient to place Deputy District Attorney Wissler in the role of an investigator and outside the role of a prosecutor. Accordingly, Wissler is shielded from liability under absolute immunity for her very limited involvement in drafting the supporting affidavit.

### **CONSPIRACY**

Gibbons also claims that there are sufficient facts from which a jury could reasonably conclude that there was a “general conspiracy”<sup>61</sup> among Sergeant Carr, Officers Lambert and Mazuran, Deputy Stewart, and Deputy District Attorneys Morgan and Wissler. Gibbons asserts that these defendants “perceived an opportunity to jettison [sic] their careers by bringing down a rising

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<sup>59</sup>*Imbler v. Pachtman*, 424 U.S. 409, 431 n. 33 (1976)

<sup>60</sup>*Van Deelen*, 53 F. Supp. 2d at 1229.

<sup>61</sup>Plaintiff’s Memorandum in Opposition to Defendants’ Motion to Dismiss, p. 32 (Oct. 26, 2004).

star in the local community and the banking industry nationally.”<sup>62</sup> While “allegations of conspiracy may, indeed, form the basis of a § 1983 claim,<sup>63</sup> a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants.<sup>64</sup> “Conclusory allegations of conspiracy are insufficient to state a valid § 1983 claim.”<sup>65</sup>

Gibbons has failed to present anything more than conclusory allegations with regard to his accusations that several sheriff deputies, including the Salt Lake County Sheriff, and several county prosecutors, including the Salt Lake District Attorney, conspired against him. Gibbons asserts that he was conspired against because of his social status, high-profiled position at a prestigious Utah bank, and lifestyle. He has admitted, however, that he knows of no one who can testify or who otherwise has personal knowledge of this alleged conspiracy. Gibbons has no evidence to rebut the countless assertions by the defendants that at the time of his arrest no person involved in the investigation knew Gibbons was a CFO. Moreover, Gibbons has no evidence of any agreement among Officers Lambert, Mazuran, and Carr to conspire against him. Gibbons has no evidence that there was concerted action between *any* sheriff deputy and the county prosecutors. In short, Gibbons has simply failed to carry his burden of providing sufficient evidence to support his claim of conspiracy, and therefore, this claim is dismissed.

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<sup>62</sup>*Id.*

<sup>63</sup>*Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998).

<sup>64</sup>*Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994), *cert. denied*, 513 U.S. 832 (1994).

<sup>65</sup>*Id.*

## MALICIOUS PROSECUTION

In establishing a claim for malicious prosecution, the Tenth Circuit has found that the common law elements of malicious prosecution are “the starting point for the analysis of a § 1983 malicious prosecution claim.”<sup>66</sup> The Circuit further held that the ultimate question that must be reached in a malicious prosecution case is “whether the plaintiff has proven a *constitutional* violation,” — “in the § 1983 malicious prosecution context, that constitutional right is the Fourth Amendment’s right to be free from unreasonable [searches and] seizures.”<sup>67</sup> In short, the Tenth Circuit recognizes a cause of action under § 1983 for malicious prosecution if the prosecution is conducted in a way that implicates constitutional rights.<sup>68</sup>

Under Utah law, lack of probable cause is an essential element of the tort of malicious prosecution.<sup>69</sup> To establish a *prima facie* case for malicious prosecution, the plaintiff must show that: (1) defendants initiated or procured the prosecution against an innocent plaintiff; (2) defendants did not have probable cause to initiate the prosecution; (3) defendants initiated the prosecution primarily for a purpose other than that of bringing an offender to justice; and (4) the prosecution terminated in favor of the plaintiff.<sup>70</sup>

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<sup>66</sup>*Taylor v. Meacham*, 82 F.3d 1556, 1561 (10th Cir. 1996), *cert. denied*, 519 U.S. 871 (1996).

<sup>67</sup>*Id.*

<sup>68</sup>*See Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004).

<sup>69</sup>*Hodges v. Gibson Prods. Co.*, 811 P.2d 151, 158 (Utah 1991).

<sup>70</sup>*Haywood*, 999 F. Supp. at 1461 (citing *Hodges*, 811 P.2d at 156).

Considering Gibbons was acquitted of the charges filed against him, elements one and four are undisputed. As to the second element — lack of probable cause — there remains a genuine issue of material fact that forces the court to deny summary judgment on this claim as it applies to defendants Lambert and Mazuran; summary judgment is granted as to all other named defendants to this claim. “Where a party is responsible for providing false information or manufactured evidence that influences a decision whether to prosecute, he may be held liable for malicious prosecution.”<sup>71</sup> While Lambert’s and Mazuran’s testimony provided reasonable grounds for making the arrest, taking all the evidence in the light most favorable to Gibbons, there is a factual dispute as to whether these two defendants planted evidence in Gibbons’ home and falsely pursued the prosecution, demonstrating malice. To be clear, the court does not believe that evidence was planted in this case. To the contrary, the court strongly believes evidence was *not* planted. There is powerful evidence that Gibbons repeatedly used drugs in his home. The only issue before the court at the time, however, is whether Gibbons has some direct evidence that could be reasonably interpreted as suggesting methamphetamine was planted in his night stand drawer on June 21, 2001. Because there is a triable issue of fact on that narrow question, summary judgment must be denied on these claims.

Gibbons has presented more than simply his unsupported allegation that evidence was planted in his home. Gibbons’ evidence includes a video taken by law enforcement soon after the search which fails to show the baggie in the night stand where the deputies testified it was found. He has also provided a digital photograph arguably taken after the video was recorded that does show

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<sup>71</sup>*Chimurenga v. City of New York*, 45 F.Supp. 2d 337, 343 (S.D.N.Y. 1999).

the baggie present in the night stand. That photograph was taken by Officer Lambert. The officers have not explained this arguable discrepancy. Comparing the video to the photo taken after the video was recorded, there remains a factual dispute regarding the planting of evidence, and therefore, summary judgment is precluded on the malicious prosecution claim. Gibbons, however, has failed to provide the court with any evidence that anyone other than Officers Lambert and Mazuran (Mazuran was the officer who claims he found the baggie and Lambert took the digital photo that show the baggie in the night stand) was involved in the planting of evidence allegation. Therefore, all other defendants are dismissed as to this claim. Again, the court does believe the jury will ultimately find for Gibbons on this claim. To the contrary, the court believes the jury will in all likelihood rule for the officers. The court, however, recognizes that “[t]he credibility of the witnesses presented, as well as the weight of the evidence, is for the jury to determine and the court will not substitute its judgment therefor.”<sup>72</sup> Accordingly, this claim must be allowed to go forward.

## **OTHER FOURTH AMENDMENT CLAIMS**

### ***No Probable Cause for Arrest***

In a § 1983 action of unlawful arrest, defendant law enforcement officers lose their shield of qualified immunity only if they could not have reasonably believed Gibbons’ arrest was based on probable cause. The Fourth Amendment requires that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.”<sup>73</sup> A warrantless arrest by a law officer is reasonable under

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<sup>72</sup>*Taylor v. Illinois*, 484 U.S. 400, 428 (1988) (quoting *People v. Van Dyke*, 111 N.E. 2d 165, 167 (Ill. 1953)).

<sup>73</sup>U.S. Const. amend IV.

the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.<sup>74</sup>

Regardless of the court's finding that there remains a material dispute as to whether the baggie was planted, summary judgment is nonetheless granted on Gibbons' unlawful arrest claim. If the "planted" baggie — again, the court must place that evidence in a light most favorable to Gibbons — had been the only basis for his arrest, the defendants would have arguably lacked probable cause to arrest Gibbons. That, however, is not the case. As referenced to earlier, the following items, in addition to the baggie, were seized from Gibbons' home on the day he was arrested: pornographic materials (magazines, videos, and dvds), a leather whip, three pairs of handcuffs, a vibrator, nitrous oxide cartridges, rave party paraphernalia, syringes, and six bottles of an unknown liquid. Considering that nitrous oxide cartridges, in certain circumstances, are labeled controlled substances,<sup>75</sup> finding them in Gibbons' home provided a reasonable basis on which the arresting officer could believe that Gibbons committed or was committing an offense. Furthermore, in light of the many pornographic and other adult-oriented items found in Gibbons' house, most of which were accessible to Gibbons 15-year old daughter, it was reasonable for the arresting officer to believe that Gibbons had dealt harmful material to his minor daughter, a violation of Utah law.<sup>76</sup> Therefore, because law enforcement officers found evidence beyond the baggie to support their

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<sup>74</sup>*See United States v. Watson*, 423 U.S. 411, 417-24 (1976); *Bringar v. United States*, 338 U.S. 160, 175-76 (1949).

<sup>75</sup>Utah Code Ann. § 58-37-4(2)(a)(vii).

<sup>76</sup>*Id.* at 76-10-1206.



belief that Gibbons had committed a crime, his claim for wrongful arrest cannot survive summary judgment.

### ***Illegal Search and Seizure of Hair, Blood, and Urine***

The affidavit supporting the search warrant issued on June 22, 2001, was based on probable cause relating to the methamphetamine found in Gibbons' night stand. Because of the court's finding of a material dispute as to whether that methamphetamine was planted by certain defendants, summary judgment is denied as to Gibbons' claim that the search of his hair, blood, and urine violated his constitutional rights. For reasons set forth previously, however, summary judgment is granted as to all defendants other than Officers Lambert and Mazuran.

The court also rejects Gibbon's argument that because urine was not itemized in the blood and hair search warrant, that defendants exceeded the scope of the warrant. According to the evidence reports, law enforcement personnel seized blood, hair, and urine samples from Gibbons. The warrant did not include urine, but did authorize the taking of blood and hair samples. Having already performed the more intrusive task of taking blood, it was reasonable to believe that a far less-intrusive search — a urine sample — was also allowed.

### ***Excessive Force Claims***

As part of his § 1983 action, Gibbons has claimed that certain defendants used excessive force in their search of his home and person on June 21, 2001. The first step in addressing an excessive force claim brought under § 1983 is to "identify[] the specific constitutional right allegedly infringed by the challenged application of force."<sup>77</sup> In this case, Gibbons rightfully rests his claim

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<sup>77</sup>*Graham v. Connor*, 490 U.S. 386, 394 (1989).

on the Fourth Amendment's protection against *unreasonable* seizures of the person.<sup>78</sup> "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."<sup>79</sup> The test is an objective one.<sup>80</sup>

Here, Gibbons bases his excessive force claim on the fact that law enforcement entered his home very early in the morning, with handguns and rifles drawn. Further facts supporting his claim are that he was ordered to the ground and felt a rifle nozzle pressing to his back. Lastly, he was handcuffed with his hands behind his body. Gibbons, however, has admitted that he was not physically injured and that within minutes of the sheriffs' entry, he had been handcuffed, allowed to dress, and was placed sitting on a couch. In light of the court's finding that probable cause existed to search Gibbons' home, the governmental interest in securing the area and protecting officers from potential danger was sufficient to justify the early morning search and the way in which the search was executed.<sup>81</sup> As for ordering him to the floor, handcuffing him, and pressing a gun to his back, the court finds that given the facts surrounding the search (possible multiple victims of sexual assaults, history of large number of guests in the home, and allegations of drug distribution), it was

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<sup>78</sup>*Id.* at 395 ("[A]ll claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness standard', rather than under a 'substantive due process' approach.").

<sup>79</sup>*Id.* at 396 (quoting *Terry v. Ohio*, 392 U.S. 1, 8 (1968)).

<sup>80</sup>*See Scott v. United States*, 436 U.S. 128, 137-39 (1978).

<sup>81</sup>*See Thompson v. City of Lawrence*, 58 F.3d 1511, 1517 (10th Cir. 1995).

objectively reasonable for the officers to enter and restrain Gibbons in the manner they did. Consequently, Gibbons' excessive force claim is dismissed entirely as to all defendants.

### ***Perp Walk***

The Fourth Amendment not only forbids unreasonable search and seizures, but also dictates that any searches and seizures must be carried out in a reasonable manner.<sup>82</sup> Gibbons claims his seizure (i.e., his arrest) was carried out unreasonably. In particular, Gibbons argues that by informing the media of his arrest and forcing him to walk in an area visible by television cameras and reporters, the law enforcement officers executed an unreasonable search and seizure.

In *Wilson v. Layne*, law enforcement allowed writers and photographers from the Washington Post to accompany them during a search of a home and arrest of its owner.<sup>83</sup> The photographer took numerous pictures while inside the home and the print reporter witnessed the confrontation between police and an individual who was living in the home.<sup>84</sup> The Court held that a media ride-along during the execution of an arrest warrant in a private home violated the Fourth Amendment.<sup>85</sup> In its reasoning, the court found that the presence of reporters in the home was not related to the objectives of the arrest, and rejected defendants' arguments that it nevertheless served legitimate police purposes.<sup>86</sup> Here, unlike in *Wilson*, the media did not enter Gibbons' home and did not take

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<sup>82</sup>See *Graham v. Connor*, 490 U.S. at 395; *Lauro v. Charles*, 219 F.3d 202, 208 (2nd Cir. 2000).

<sup>83</sup>526 U.S. 603 (1999).

<sup>84</sup>See *id.* at 607-08.

<sup>85</sup>See *id.* at 605.

<sup>86</sup>See *id.* at 612-14.

photographs or video of the search. Further, Gibbons has not produced sufficient evidence to support his claim that law enforcement allowed reporters onto Gibbons' property during the search. Instead, he argues that because of some video footage shown by a local television station showing the interior of his garage, one can "infer" that law enforcement allowed the media to enter Gibbons' property. Such speculative inferences cannot defeat a well-supported summary judgment motion.

In light of these distinguishing facts, there is no binding precedent upon which the court may base its decision regarding the validity of Gibbons' claim. Therefore, the court has looked to other circuits for guidance and agrees with the Second Circuit's two-step approach in *Lauro v. Charles*<sup>87</sup> which allowed a § 1983 claim to proceed against police who stage a "perp walk." In *Lauro*, after hearing of the media's interest in the investigation and after having already taken Lauro to a station house, city police re-handcuffed Lauro and walked him out the front door and outside the station where several members of the media were waiting.<sup>88</sup> A police officer then placed Lauro in a police car, drove around the block, removed Lauro from the car, and walked him back into the same station house, again in front of cameras and reporters.<sup>89</sup>

*Lauro* announced a two-step approach for analyzing perp walk claims. First, the court must determine whether the perp walk intruded upon interests protected by the Fourth Amendment.<sup>90</sup> And second, if the court determines it did, it must then determine whether the perp walk was nevertheless

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<sup>87</sup>*Lauro*, 219 F.3d at 211-13.

<sup>88</sup>*See id.* at 204-05.

<sup>89</sup>*See id.*

<sup>90</sup>*See id.* at 211-13.

reasonable in light of legitimate law enforcement purposes.<sup>91</sup> In this case, Gibbons was handcuffed and escorted outside his home by Officer Chow and quickly placed inside the sheriff's truck. While outside, video cameras rolled and reporters took down notes during the brief time Gibbons was waiting to enter Officer Chow's truck. Taking these facts into account and comparing them to facts from cases such as *Wilson* and *Lauro*, it is clear no Fourth Amendment interests were implicated; there was no delay in the arrest, and the media observed from a public place.

Even if Gibbons were successful in showing that the perp walk somehow marginally intruded upon his protected Fourth Amendment interests, the court still would find that the perp walk was nonetheless reasonable in light of legitimate law enforcement purposes. The allegations and evidence in this case dealt primarily with allegations of drug distribution to young women, several of which were minors. Moreover, Officer Lambert received information from informants that lead him to suspect Gibbons' home was a safe-haven for illegal activity, including drug use and possible sexual assaults on young women while under the influence of alcohol and illegal substances. Considering the seriousness of the allegations and because many of the potential victims were unknown, the broadcast of Gibbons' face during the arrest was a legitimate law enforcement purpose because it served as notice to potential victims that an investigation against Gibbons was ongoing and that any further information was being requested. In addition to that purpose, the perp walk also made public law enforcement's efforts in dealing with what had become known as the "rave" scene — parties involving young people consuming a variety of illegal substances.

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<sup>91</sup>*See id.*

The court is aware that similar legitimate purposes were found to be insufficient by the Supreme Court in *Wilson*.<sup>92</sup> The Court's conclusion, however, was based on the high level of intrusiveness demonstrated by law enforcement; law enforcement allowed reporters and photographers to enter the home during the search and interrogation. "The reasons advanced by [law enforcement]," the Court stated, "taken in their entirety, fall short of justifying the presence of media inside a home."<sup>93</sup> Therefore, because the level of intrusiveness here was far from that in both *Wilson* and *Lauro*, and because several legitimate law enforcement purposes were served by having the media present to witness Gibbons being escorted from his house, defendants' motion for summary judgment on this Fourth Amendment claim is granted as to all defendants other than Officers Lambert and Mazuran.

### **SUBSTANTIVE DUE PROCESS CLAIMS**

Gibbons also claims that by planting evidence, destroying material evidence, tampering with a hair sample, failing to properly document evidence found during the June 21, 2001, search, and failing to return seized evidence, defendants violated his Fourteenth Amendment substantive due process rights. The obligations to disclose and preserve impeachment/exculpatory evidence are grounded in the due process right to a fair trial.<sup>94</sup> "Thus, the withholding or destruction of evidence violates a criminal defendant's constitutional rights only if, as a result of the withholding or

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<sup>92</sup>526 U.S. at 612-14.

<sup>93</sup>*Id.* at 614.

<sup>94</sup>*See Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *United States v. Bagley*, 473 U.S. 667, 678 (1985); *United States v. Agurs*, 427 U.S. 97, 104 (1976).

destruction of evidence, the criminal defendant is denied a fair trial.”<sup>95</sup> Because the only judgment the court entered in Gibbons’ criminal case was a judgment of acquittal, Gibbons cannot be said to have been deprived of the right to a fair trial.<sup>96</sup> Consequently, defendants’ motion for summary judgment on Gibbons’ substantive due process claims relating to the destruction of evidence by Officer Stewart and any other Fourteenth Amendment claim alleging tampering of evidence is granted as to all defendants. Regarding Gibbons’ claim that defendants have failed to return his personal property, defendants have represented to the court that all of defendants’ property is being retained until the civil suit ends. Defendants have promised the court that all Gibbons’ property will be returned immediately upon the conclusion of the case and that defendants would be liable for any damage to the property that may occur while under defendants’ watch. Retaining evidence during a lawsuit is proper; Gibbons’ claim on this subject is dismissed as well.

### **DAMAGE TO REPUTATION**

Both parties have briefed the issue as to whether Gibbons can assert a defamation claim within his § 1983 action. The court agrees with Gibbons’ argument that if raised properly, a defamation claim is proper under the “stigma-plus” test hinted to by the Supreme Court<sup>97</sup> and further articulated by several of the circuits.<sup>98</sup> The court, however, need not reach a conclusion as to whether

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<sup>95</sup>*Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999).

<sup>96</sup>*Id.* (“Regardless of any misconduct by government agents before or during trial, a defendant who is acquitted cannot be said to have been deprived of the right to a fair trial.”).

<sup>97</sup>*Paul v. Davis*, 424 U.S. 693 (1976).

<sup>98</sup>*See Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991); *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980).

Gibbons' defamation claim is proper because nowhere in his complaint does Gibbons allege such a cause of action. While two of the state claims previously dismissed by the court dealt with Gibbons' alleged damage to reputation — intrusion and false light — Gibbons never stated a federal claim for defamation. Rather, Gibbons, in his complaint, has only asserted that his reputation has been injured as proof of damages. In light of the court's order that the issues of liability and damages be tried separately, and because Gibbons failed to allege a federal defamation claim in his complaint, the court need not rule on this issue because it was not properly presented. The court will, therefore, reserve its conclusions regarding any damage Gibbons' reputation may have suffered for the damage portion of the case.

### **CONCLUSION**

To summarize, Gibbons has failed to demonstrate that there remains a genuine issue of material fact as to the existence of probable cause. Gibbons has, however, successfully shouldered his burden of providing evidence that, taken in the light most favorable to him, could lead a reasonable trier of fact to conclude that Officers Lambert and Mazuran violated his Fourth Amendment protection from an unlawful arrest by planting a baggie containing methamphetamine during an otherwise lawful search.

The court does not believe the baggie was planted — to the contrary, the court believes no baggie was planted. The issue, however, must be decided by a jury. In light of this surviving allegation, several other claims must remain, but only as to Officers Lambert and Mazuran. All other defendants are entitled to summary judgment based on either absolute immunity, a good faith defense, or simply Gibbons' failure to support his claims with more than just a scintilla of evidence [167-1].



Lastly, with regard to Gibbons' motion to strike the court's use of the deposition testimony of John Wester [219-1], the court did not significantly rely upon Wester's deposition in making its determination. And to clarify, the court originally sought Wester's deposition in an effort find further support for *Gibbons*' attempt to overcome defendants' motion for summary judgment — the court burdened the defendants with the task of supplying the deposition since they were the moving party. In sum, the court's decision today would be no different had it not summoned Wester's deposition.

As a consequence of the court's holding, there remains the legally complex and fact-intensive issue of damages. Therefore, as allowed under Federal Rule of Civil Procedure 42(b), the court hereby orders that all issues relating to damages be bifurcated from proceedings in which liability will be determined and subsequently addressed in separate proceedings in the instance that a jury finds Officer Lambert or Officer Mazuran liable on any of the remaining claims.

DATED this 31<sup>st</sup> day of January, 2005.

BY THE COURT:

/S/  
Paul G. Cassell  
United States District Judge

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:02-cv-01244

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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SALT LAKE CITY, UT 84145-0444

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CLERK, U.S. DISTRICT COURT

2005 JAN 28 P 4: 04

DISTRICT OF UTAH

BY: \_\_\_\_\_  
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**Attorney for Defendants U.S.A. United Staffing Alliance, L.L.C., and Everest  
Administrators, Inc.**

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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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MICHAEL GEDDES and KARI GEDDES, :  
individually and as parents :  
and guardians of ANDREW GEDDES, :  
a minor child, :

Plaintiffs, :

vs. :

U.S.A. UNITED STAFFING :  
ALLIANCE, L.L.C., a limited :  
liability company, and EVEREST :  
ADMINISTRATORS, INC., a Utah :  
corporation, :

Defendants. :

~~PROPOSED~~ ORDER TO  
EXTEND TIME FOR DEFENDANTS  
TO FILE RESPONSE TO PLAINTIFFS'  
SUPPLEMENTAL MEMORANDUM

Case No. 2:03cv00440-PGC

Judge: Paul G. Cassell

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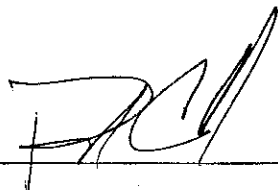
Having considered DEFENDANTS' MOTION FOR EXTENSION OF TIME TO FILE

35

RESPONSE TO PLAINTIFF' SUPPLEMENTAL MEMORANDUM and the points and  
authorities therein, the Court hereby orders that Defendants' response is due and must be filed  
on February 11, 2005.

SO ORDERED:

DATE: Jan. 24, 2005

  
\_\_\_\_\_  
JUDGE PAUL G. CASSELL

tsh

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:03-cv-00440

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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JAN 28 2005  
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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES T. CAREY,

Defendant.

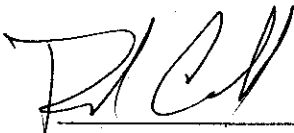
: 2:04CR00508PGC  
:  
: ORDER OF CREDIT TOWARD  
: RESTITUTION  
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Upon Motion of the Plaintiff and for good cause;

IT IS HEREBY ORDERED that the defendant in the above-entitled case be given credit toward the order of restitution in the amount of two thousand seven hundred and ninety dollars (\$2,790.00).

BY THE COURT:



Paul G. Cassell  
District Court Judge

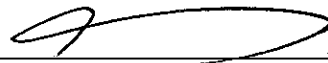
1/28/05



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of the United States Attorney's Office, and  
that a copy of the foregoing ORDER OF CREDIT TOWARD RESTITUTION, was mailed,  
postage prepaid to all parties named below, this 15 day of December, 2004.

Lee Rasmussen  
42 Exchange Place  
Salt Lake City, Utah 84111



---



tsh

United States District Court  
for the  
District of Utah  
January 31, 2005

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00508

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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US ATTORNEY'S OFFICE

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EMAIL

United States Marshal Service  
DISTRICT OF UTAH

,  
EMAIL

US Probation  
DISTRICT OF UTAH

,  
EMAIL